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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

ANGEL SANTIAGO,
Petitioner,

V.

K-SIX TELEVISION, INC., DEVIN HELMES, AMANDA SALINAS, ANAHI GARCIA, DAVID CORTEZ, JUAN ZAMORA, ALFONSO HOLGUIN, JUAN RAMIREZ, AND PAUL RAYMOND BUITRON, III.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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ISSUE

Section 51.014(a)(6) of the Texas Civil Practice & Remedies Code allows a media defendant an immediate interlocutory appeal from a denial of their motion for summary judgment. This procedural protection for the media is granted in addition to the substantive protections embodied in *New York Times Co. v. Sullivan and Gertz v. Robert Welch, Inc.* Does the Texas statute impermissibly re-balance the respective interests of libel litigants?

If so, does the re-balancing invade petitioner's 'strong and legitimate' interests as marked-out by the First and Fourteenth Amendments to the Constitution?

LIST OF PARTIES

Petitioner certifies that the following is a list of all parties and all counsel in this matter.

1.) Petitioner is Angel Santiago, who is the plaintiff below. The attorney representing Petitioner is:

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Edward P. Fahey, Jr.
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2.) Respondents in this case are: K-Six Television, Inc., Devin Helmes, Amanda Salinas, Anahi Garcia, David Cortez, and Juan Zamora. All are represented by:

The Rangel Law Firm, P.C.
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3.) The non-media defendants in this case are: Alfonso Holguin, Juan Ramirez, and Paul Raymomd Buitron III. They are not parties to the appeal complained of in this petition. Holguin and Ramirez are represented by:

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1420 San Bernardo Ave.
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Buitron III is represented by:

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TABLE OF CONTENTS

Issue i

List of Parties ii

Table of Contents iii

Table of Cited Authorities iv

Opinions Below 1

Preliminary Statement 2

Basis for Jurisdiction 2

The Statute Complained Of 3

Statement of the Case 5

1. The Facts 5

2. The Proceedings Below 6

3. Federal Question Is Raised Below 8

4. Texas Court's Ruling Was Not Based on an Adequate and Independent State Ground 10

5. Legislative History of the Statute 11

Argument 15

1. The Nature of Petitioner's Interest 15

2. The Nature of the Governmental Interest 18

3. The Texas Statute Denies Santiago Equal Protection Under the Law 21

Conclusion 25

TABLE OF AUTHORITIES

Cases **Page**

A.H. Belo Corp. v. Cocoran, 52 S.W.3d 375 (Tex. App.---Houston [1st Dist.] 2001, no pet.). 22

Calder v. Jones, 465 U.S. 783 (1984). 2, 8, 9, 19, 20, 23

Celotex v. Catrett, 477 U.S. 317 (1986). 6

Cooper v. Aaron, 358 U.S. 1 (1959). 24

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975). 25

Curtis Publ'g. v. Butts, 388 U.S. 130 (1967). 17

Dunn & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985) . . 16

Garrison v. State of Louisiana, 379 U.S. 64 (1964) 17

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). . . . . i, 2, 9, 16, 17, 18, 20, 21, 23, 24

Huckabee v. Time Warner Entertainment, 19 S.W.3d 413 (Tex. 2000) . . 22

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Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). 2

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Milkovich v. Lorrain Journal, Co., 497 U.S. 1 (1990). 16

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928). 9

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Palko v. State of Connecticut, 302 U.S. 319 (1973). 16

Parham v. Hughes, 441 U.S. 347 (1979). 23

Phildelphia Newspapers v. Hepps, 475 U.S. 767 (1986). 16

Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74 (1980). 9

Reed v. Reed, 404 U.S. 71 (1971). 22

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Rosenblatt v. Baer, 383 U.S. 75 (1966). 15, 17

San Antonio Indep. Sch. Dist v. Rodriguez, 411 U.S. 1 (1973). 23

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U.S. Const. art III, § 2. 18

U.S. Const. art VI, § 2. 18

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U.S. Const. amend. X. 18

U.S. Const. amend. XIV. . . . . i, 22

28 U.S.C. § 1257(a). 3

28 U.S.C. § 2403(b). 3

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OPINIONS BELOW

The order of the Supreme Court of Texas was issued without opinion. The order is reprinted in Appendix, Tab B.

The opinion and order of the Texas Fourth Court of Appeals, reversing the denial of K-Six' motions for summary judgement, and rendering judgement that plaintiff take nothing is reported at: *K-Six Television, Inc. v. Santiago,* No. 04-01-00592-CV, __S.W.3d__(Tex. App.–San Antonio Feb. 13, 2002, mand. denied). The opinion and order are reprinted in Appendix, Tab C.

PRELIMINARY STATEMENT

Santiago brings this petition because a statute[1] in the State of Texas is repugnant to the U.S. Constitution. The validity of the statute was drawn into question by Santiago in his petition for writ of mandamus at the Texas Supreme Court.[2] The statute conflicts with this Court's decisions in *New York Times Co. v. Sullivan,*[3] *Gertz v. Robert Welch, Inc.,*[4] and *Calder v. Jones.*[5] As a result, Texas is out-of-line with the rest of the nation in adhering to the Constitution. Under the federal Constitution, the charge of this Court is to ensure that laws made "in pursuance of"[6] the Constitution are supreme, and are uniform throughout the country.[7]

BASIS FOR JURISDICTION

1. The order complained of in this petition was entered by the Supreme Court of Texas on March 19, 2002.[8]

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1 See page 3-5, *infra*.

2 Appendix Tab A.

3 376 U.S. 254 (1964).

4 418 U.S. 323 (1974).

5 465 U.S. 783 (1984).

6 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 180 (1803).

7 *McKesson Corp. v Florida Alcohol & Tobacco Div.,* 496 U.S. 18, 28-29 (1990) (quoting *Martin v. Hunter's Lessee,* 1 Wheat. 304, 340 (1816)).

8 Appendix Tab B.

2. No motions for rehearing were filed.

3. Jurisdiction of the Court is proper under 28 U.S.C. 1257(a).

4. In this case, 28 U.S.C. §2403(b) may apply. Therefore, notifications to the Attorney General of the State of Texas were made, as required by this Court's Rule 29.4(c).

THE STATUTE COMPLAINED OF

TEXAS CIVIL PRACTICE AND REMEDIES CODE
Vernon's Texas Codes Annotated, (Vol. 3, 1997)(cumulative annual pocket part, 2002).

§ 51.014. Appeal From Interlocutory Order

(a) A person may appeal from an interlocutory order of a district court, county court at law, or country court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary, injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgement that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgement that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedured, except in a suit brought under the Family Code; or

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.

(c) A denial of a motion for summary judgement, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay of the commencement of trial under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

(2) the 180th day after the date the defendant files:

(A) the original answer;

(B) the first other responsive pleading to the plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a) (5), (7), or (8), the responsive pleading that raised that defense.

(d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) the parties agree to the order.

(e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.

(f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

STATEMENT OF THE CASE

1. The Facts

For nine years preceding the month of June 2000, Angel Santiago was president of the Laredo Amateur Boxing Club. He served in that position as a volunteer. The purpose of the club is to provide organized athletic activity to disadvantaged youth in Laredo, Texas. The LABC is a private, not-for-profit corporation, and is funded in part by the United Way.

Santiago resigned his position in June 2000. Soon thereafter, three coaches at the club began to accuse Santiago of mishandling the club's money. The Board of Directors of the club held a meeting where the complaints were aired. Santiago answered the accusations to the complete satisfaction of the Board. The Board at that time consisted of a State District Judge, several attorneys, and a Certified Public Accountant. The Board meeting seemed to have put the matter to rest.

But, three months later, the coaches appeared on television and accused Santiago again, this time of stealing $15,000 of the club's money. The 'exclusive' news report[9] was carried by KVTV-Channel 13, owned by K-Six Television, Inc.

2. The Proceedings Below

Santiago filed suit in state court for defamation against the coaches, K-

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9 Appendix Tab C. The full text of the news report is printed in the Fourth Court of Appeals opinion at *K-Six Television, Inc. v. Santuiago,* No 04-01-00592-CV, __S.W.3d__, (Tex. App.-San Antonio Feb. 13, 2002, mand. denied).

Six Television, Inc., and its employees who were involved in preparing the news report. The suit alleges: a) libel and slander by the coaches, b) republication of the libel by K-Six, and c) a separate libel by K-Six and its employees. Because the theft of $15,000 is a crime punishable by imprisonment in Texas, Santiago also alleged libel *per se*.

After discovery, K-Six moved for summary judgement under two Texas rules. One was a 'traditional' motion,[10] where the burden is on the movant alone, and the second was a 'no-evidence' motion,[11] similar to the federal counterpart in the *Celotex Corp. v. Catrett*,[12] where the burden of proving falsity, for example, shifts to the non-movant. Santiago defeated both of K-Six' motions.[13]

Under the general rules of Texas practice, Santiago's case would then have gone to trial. But K-Six availed itself of the Texas interlocutory appeals statute, which gives media defendants the right to immediate and accelerated review of the trial court's denial. Santiago challenged K-Six' appeal on the ground that K-Six had not complied with the statute's requirements. The Fourth Court of Appeals, however, found its jurisdiction proper, reversed the trial court's denial of K-Six' motions for summary

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10 Tex. R. Civ. P. 166a(c).

11 Tex. R. Civ. P. 166a(i).

12 477 U.S. 317 (1986).

13 Appendix Tab D, E, and F.

judgment, and rendered judgment that Santiago take nothing. [14] This result is not uncommon now in Texas libel cases:

> Interlocutory appeals from denials of summary judgement have proven very effective in disposing of unmeritorious libel claims. Since the law was enacted in 1993, 20 interlocutory libel-related appeals have been reported by the Texas Courts of Appeals., Five of those cases were disposed of on procedural grounds. Of the 15 cases to reach the merits, 13 cases resulted in judgements for media defendants, while only two claims were found possessing sufficient merit to be remanded for trial. [15]

Therefore, only 10% of libel claims survive interlocutory review. Before the statute was enacted, 25% of libel claims survived post-trial appellate review.[16]

3. Federal Issue Is Raised Below

Santiago filed a motion for rehearing in the intermediate appellate court.[17] It was denied. Next, Santiago filed a petition for writ of

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[14] Note 9, *supra*.

[15] Ford, J., and Ogden, B., "The Texas Case Law Experience Under the Statute," 2 *LDRC Bulletin* (quarterly newsletter of the Libel Defense Resource Center, Inc.) 11 (July 1999).

[16] Note 39, *infra*, Tr. 17:8-11

[17] Appendix Tab G.

mandamus with the Supreme Court of Texas.[18] The petition was based solely upon the improper exercise of jurisdiction by the appellate court. The petition was grounded, partly, in a state law claim that jurisdiction under the Texas statute is not proper unless the media defendant make specific reference to some constitutional protection of free speech. The petition was also grounded on a federal constitutional claim. This is the stage of proceedings where the federal question was first raised by Santiago.

Santiago's federal claim was put forth in the last section of his petition, entitled, "Constitutional Argument-Harm Done to Santiago."[19] The first half of the argument relates to the Texas Constitution, while in the second, it was pressed upon the Court that the judicial dicta in *Calder v. Jones* states that "special procedural protections" for defamation defendants have repeatedly been denied by the U.S. Supreme Court.[20] And, that the "chilling effect" of such lawsuits on the media has already been taken into account in the substantive law of the First Amendment.[21] In other words, the enhanced burden on libel plaintiffs as to fault and falsity, derived from *Sullivan and Gertz,* are all the protections the media gets.

The Texas Court was also shown that the U.S. Constitution does not require any special rules to apply at summary judgement in a defamation

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18 Appendix Tab A.

19 Appendix Tab A.

20 465 U.S. 783, 790-91 (1984).

21 *Id.*

case. [22] Based on these arguments, Santiago asserted that the Texas statute, in light of *Calder*, is "superfluous" and "a form of overkill." This was the method by which Santiago raised his federal claim in the Supreme Court of Texas.

It is true Santiago employed no particular words, such as: 'unconstitutional,' 'equal protection,' or 'due process' in his petition. But this Court has held:

> [I]t is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, 'no particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.'[23]

Thus, Santiago raised the federal issue when he directly cited the Texas Court to *Calder* for the proposition that the Texas statute impermissibly goes beyond the protections for the media set out in *Sullivan and Gertz*.

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22 *Id.*

23 *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.5 & 85 n.9 (1980) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

4. Texas Court's Ruling Was Not Based on an Adequate and Independent State Ground

The Texas Supreme Court "passed on"[24] Santiago's federal question when it denied his petition without opinion.[25] Therefore, in this case, as in *Michigan v. Long,*[26] the state ground is not apparent from the four corners of the opinion. Neither is there a plain statement that the decision below rested on an adequate and independent state ground.[27] And, unless the Texas Constitution provides more protection to free speech rights than the U.S. Constitution, there could have been no state grounds upon which the Texas Court relied.

In *Turner v. KTRK Television, Inc.,* [28] a public-figure libel case, the Texas Supreme Court noted:

> while we have occasionally extended protections to defamation defendants greater than those offered by the United States Constitution, we have based those protections on the common law, not the Texas Constitution. Nothing in the language or purpose of the Texas Free Expression Clause [29] authorizes us....to afford greater weight in the balancing of interests to free expression than we would under the First Amendment...

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24 *Illinois v. Gates,* 462 U.S. 213, 219 (1978).

25 Appendix Tab B.

26 463 U.S. 1032, 1040 (1980).

27 463 U.S. at 1044.

28 38 S.W.3d 103, 117 (Tex. 2000).

29 "Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of the privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." Tex. Const. art I,§8.

Thus, the Texas Free Expression Clause is co-extensive with the First Amendment, and there was no adequate and independent state ground that supported the Texas Court's decision. Therefore, the opinion below "fairly appears to rest primarily on federal law."[30] And this Court has jurisdiction over Santiago's Appeal.

5. Legislative History of the Texas Statute

The offensive part of the Texas statute is subsection (a)(6).[31] This subsection was passed into law as Senate Bill 76 in 1993. Before, Texas had allowed interlocutory appeals only in the limited circumstances reflected in subsections (a)(1) through (a)(5). [32]

The impetus for the new legislation was a recognition by some in the Texas media that "litigation costs" in libel cases were too high. Indeed, in the year previous to the statute's enactment, A.H. Belo Corp.---owner of the *Dallas Morning Times*--- was subject to a $58MM libel judgement.[33] "Belo decided some innovative relief was in order."[34] Belo formed "an influential coalition of print and broadcast companies,"[35] soon to be know as the Appellate Fairness Coalition. Then Belo hired "three excellent

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30 463 U.S. at 1042.

31 p. 3-4, *supra.*

32 p. 3, *supra.*

33 McCarthy, M., "Texas Libel Interlocutory Appeal Statute," 2 *LDRC Bulletin* 3 (July 1999).

34 *Id.*

35 *Id.*

government relations lawyers," who pushed the bill to the top of the 73rd Legislature's agenda.[36]

In order to obtain their "innovative relief," Belo's General Counsel took some innovative steps:

> We also contacted several members of the Texas Supreme Court, and a few well-known trial lawyers, who were part of a special Supreme Court Rules Committee charged with suggesting streamlined civil procedure rules. From the committee's standpoint, the most attractive aspect of the proposed interlocutory appeal legislation was that it would permit appellate courts to eliminate claims which have constitutional or other legal infirmities prior to the public expense of a full trial. The Rules Committee saw no problem with the legislation, although it did not, understandably, enter the legislative fray on the bill.[37]

Senate Bill 76 was sponsored by then State Senator Jim Turner, now a U.S. Congressman. According to Senator Turner:

> the whole purpose of the amendment is to try to remove the chilling effect that would naturally exist against the exercise of the freedom of the press that we all know that we all believe in, but to remove the chilling effect is brought about by the fact that when suits are brought against the media, it can result in protracted litigation that even though the media is certainly going to be protected ultimately on appeal based on the Constitutional protection, they have to go through all this lengthy litigation to get there.[38]

The crux of Senator Turner's argument was: if you're sure to loose anyway,

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36 *Id.* at 4.

37 McCarthy, note 33, *supra,* at 4.

38 See note 39, *infra,* Tr. 12:3-12

better to loose sooner rather than later.

The Senate State Affairs Committee held hearings on February 17, 1993.[39] Four media witnesses testified in favor of the bill.[40] No one testified in opposition; according to the bill's co-sponsor, "because nobody signed up."[41] We are told by Belo's E.V.P. and General Counsel that: "there is no libel plaintiff's bar in the state of Texas or any organized group of libel lawyers. The Texas Trial Lawyers' Association therefore, had no significant constituency to protect."[42]

Senators raised pointed questions at the hearing. Senator Lucio wanted to know how many libel cases are filed in Texas each year. "Between twenty-five and thirty cases were filed in Texas in 1992," came the answer from Robert Deckert, C.E.O. of Belo Corp.[43] These thirty defamation actions contrast with 46,762 tort cases filed in Texas district courts during the same year.[44] Yet, the Senators were told that the main thrust behind the

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39 Appendix Tab H contains the full transcript of the Committee Hearings.

40 Tr. 7:5-8:2

41 Tr. 67:5-8

42 McCarthy, *supra,* note 33, at 3.

43 Tr. 20:13-15

44 National Center for State Courts, *Court Statistics Project* (1999) (available at <http://www.ncsc.dni.us/divisions/research/csp/csp-frd.htm>). *See* Appendix Tab I.

bill was to enhance "the efficient administration of justice."[45]

Senators Carricker, Leedham, and Sibley wanted to know why they, as individuals, or any individual asserting free speech rights, could not take advantage of the statute; and if the statute was not creating "a special class of people."[46] The response was: "we don't want to open the floodgates of appeals and allow people to---to try and manipulate the system just to get under this...procedure."[47]

The Senators were misinformed by the witnesses in some instances:

- [In] *Sullivan*, the Supreme Court of the United States established very high procedural burdens for the vast majority of libel plaintiffs, to meet before a media defendant even goes to trial. The Court's decisions contemplated that a determination of whether or not these burdens could be met should occur at the summary judgment stage;[48]

- What we're experiencing in Texas is that media defendants..are required to incur very substantial and oftentimes ruinous expenses just in order to defend our right not to be tried at all...[49]

Senator West asked: "How many of the states have similar statutes which allows [sic] for interlocutory appeals in similar situations?" The answer was misleading. "Nearly one-half of the other States, as well as the

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45 Tr. 29:15-17, Kirte Kinser, First Amendment lawyer testifying in support of the bill as a "resource witness."

46 Tr. 10:24--11:5; 42:10-15; and 44:8-16

47 Tr. 44:25--45:4

48 Tr. 18:1-8

49 Tr. 18:17-23

Federal courts, allow interlocutory appeals under some form or another, so we are certainly not the trailblazer."[50] The fact is, that no other state statute permits interlocutory appeals that are specifically targeted to benefit media defendants.[51]

Besides Texas, only two state statutes allow defendants to appeal a denial of summary judgment: New York[52] and Arkansas.[53] But in these states, the interlocutory appeal is given 'as of right,' and extends to all litigants, in all cases. The Arkansas and New York statutes are thus benign on their face, because they create no classifications, and do not discriminate against the parties on any basis.

ARGUMENT

1. The Nature of Petitioner's Interest

The nature of Santiago's interest in this case has never been better stated than by Justice Stewart in his concurring opinion in *Rosenblatt v. Baer*.[54]

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being–a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of

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50 Tr. 28:19-29:3

51 Appendix Tab J.

52 Appendix Tab K.

53 Appendix Tab L.

54 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

> life itself, is left primarily to the States under the Ninth and Tenth Amendments. But that does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

This statement has been quoted with approval by the majorities in *Gertz v. Robert Welch, Inc.*,[55] *Dun & Bradstreet, Inc. v. Greenmoss Builders*,[56] and *Milkovich v. Lorrain Journal, Co.*[57] It has been cited with equal frequency by dissenting and concurring Justices in this line of cases.[58] Therefore, the idea expressed is not just aspirational. It has the force of reason behind it.

The statement has well-served this Court as an articulation of the interest that competes with society's need for "uninhibited, robust, and wide-open debate on public issues"---the value at the center of First Amendment protections.[59] The words echo Justice Cardozo's true talismanic phrase in *Palko v State of Connecticut*, that fundamental rights are those "found to be implicit in the concept of ordered liberty."[60]

The essence of this Court's decisions in *Sullivan* and progeny has been to preserve the concept of 'ordered liberty' in the field of free expression. Liberty, on one side of the equation, being commanded by the First

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55 418 U.S. at 341.

56 472 U.S. 749, 757-58 (1985).

57 497 U.S. 1, 22-23 (1990).

58 *Gertz*, 418 U.S. at 402 (White, J., dissenting); *Philadelphia Newspapers v Hepps*, 475 U.S. 767, 780 (Stevens, J. dissenting).

59 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

60 302 U.S. 319, 324-25 (1937).

Amendment, and order, on the other side of the equation, being commanded by a recognition that the freedom of speech is not absolute.[61] Thus, many times, it has been said by this Court that the rules of *Sullivan and Gertz* developed as the result of "an accommodation" between the two competing rights.[62]

'Ordered liberty' is therefore liberty constrained. Constrained not only by Santiago's right to protect his reputation, but also by society's general need for order, peace, and happiness.[63]

In the common-law, allowing an injured person to bring a slander or libel action was a substitute for something. It was the substitute for a brawl, a duel, or some other violent self-help measure, which would "tend to incite an immediate breach of the peace."[64] Today, society has no less a need to maintain the peace. Therefore, to allow Santiago a forum for redress serves also to protect the general weal. Yet it seems in this case, the State of Texas has abdicated its traditional role under the Ninth and Tenth Amendments to protect the private personality, and to protect life itself.[65]

The Texas statute impermissibly imposes yet more burdens on

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61 *Gertz,* 418 U.S. at 341.

62 *Gertz,* 418 U.S. at 341-42.

63 Pound, R., "Interests of Personality," 28 *Harv. L. Rev.* 343, 445 (1915).

64 *Gertz,* 418 U.S. at 385 (White, J., dissenting); *Garrison v. State of Louisiana,* 379 U.S. 64, 67-69 (1964); *Curtis Publ'g v. Butts,* 388 U.S. 130, 147 (1967).

65 *Rosenblatt,* 383, U.S. at 92 (Stewart, J., concurring).

Santiago's hope for relief, beyond the significant barriers already erected in *Sullivan* and *Gertz*. In its effect, therefore, the Texas statute has all but prevented Santiago from entering that civilized place for redress–a court of law.

2. The Nature of the Governmental Interest

The State of Texas has no interest whatsoever in securing to its residents protections under the First Amendment to the U.S. Constitution. That is because such an interest is not a 'state' interest. Protection of rights under the Constitution falls upon the National Government, acting through this Court.[66] The concept of federalism requires that each sovereign level of government tend to its own business. The concept of supremacy requires that the states not interfere with the federal Constitution. "[T]here is a plain repugnance in conferring on one Government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."[67]

The Texas statute, on its face, purports to provide libel defendants with an additional measure of protection. Yet, any additional protections for the media--procedural or substantive---beyond those provided for in *Sullivan* and *Gertz*, have been roundly denied by this Court.

In *Calder v. Jones*,[68] was considered a California Supreme Court

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66 U.S. Cont. art. III, §1; art III, §2; art VI, §2; amend. X.

67 *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819).

68 465 U.S. 783 (1984).

ruling related to that state's long-arm jurisdiction over an out-of-state defendant in a libel action. The plaintiff was an actress who resided in California.[69] The defendant was The Enquirer, a Florida corporation.[70] When the defendant moved to quash service based on insufficient contacts with California, the Superior Court, in turn, "felt that special solicitude was necessary because of the potential 'chilling effect' on reporters and editors which would result from requiring them to appear in remote jurisdictions to answer for the content of articles upon which they worked."[71] The Enquirer's motion to quash was granted.[72] However, this Court found California's jurisdiction over The Enquirer to be proper on a different ground.[73] But this Court also took pains to "reject the suggestion that First Amendment concerns enter into the jurisdictional analysis."[74] The Court explained:

> the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law regarding such suits. To reinintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to

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69 *Id.* at 785.

70 *Id.*

71 *Id.* at 786.

72 *Id.*

73 *Id.* at 790-91.

74 *Id.* at 790.

> the constitutional protections embodied in the substantive laws.[75]

One of the "other contexts" where special procedural protections for libel defendants have been denied is in the context of summary judgment. The *Calder* Court cited *Hutchinson v. Proxmire*[76] for the proposition that, in defamation cases, "no special rules apply for summary judgment."[77]

The Texas statute circumvents normal summary judgment practice in Texas, which holds that denials of motions for summary judgment are not appealable orders.[78] In that sense, the statute fashions a "special rule"–one that is proscribed by *Proxmire* and *Calder.* And, although the 'jurisdictional' question in Santiago's case concerns appellate jurisdiction, not long-arm jurisdiction, it is 'jurisdictional' nonetheless, and therefore falls under the restrictions pronounced by *Calder.*

What *Calder* ultimately stands for is that the First Amendment balance has been struck. The competing interests in libel cases have already been accommodated. There is a boundary line; drawn by *Sullivan* and *Gertz.* And any attempt by anyone other than this Court to move the boundary, impermissibly encroaches upon one or the other interest at stake. In this case, the State of Texas has moved the boundary, and encroached upon Santiago's "strong and legitimate" interest in protecting his own good

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75 *Id.* [citations omitted].

76 433 U.S. 111 (1979).

77 *Calder,* 465 U.S. at 791.

78 *Jack B. Anglin v. Tipps,* 842 S.W.2d 266, 272 (Tex. 1992).

name.[79]

Although the Texas statute may be rationally related to someone's interest, it is not rationally related to any state interest. Therefore, the Texas statute is unconstitutional.

3. The Texas Statute Denies Santiago Equal Protection Under the Law.

On its face, the Texas statute creates two classifications:

> 1.) member of the electronic or print media;
> 2.) a person whose communication appears in the media.[80]

These two classes of persons are the ones honored by the Texas Legislature. Their rights are triggered when: 1.) their motion for summary judgment is denied; and 2.) the motion was based on, a claim or defense, arising under the First Amendment, or under the Texas Constitution. The right had to be conferred by statute, because it is an exception to the general rule.[81]

The statute creates more classifications by implication. The existence of a media defendant implies that there is a plaintiff, who has some cause of action against the media. The statute does not require, however, that the claim be a libel or defamation claim. Indeed, the statute has been successfully invoked where the plaintiff's claims against the media defendant were based on: "violation[s] of...the Texas Family Code, ...the

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79 *Gertz*, 418 U.S. at 348.

80 Tex. Civ. P. & Rem. Code §51.014(a)(6).

81 See note 78, *supra.*

Texas Penal Code, negligence, gross negligence, negligence per se, intentional infliction of emotional distress, and civil conspiracy."[82]

Although it was represented differently to the state Senators at their committee hearing,[83] plaintiffs have no access to the benefits of the statute. This distinction is not discernable by reference to the statutory language alone. But at least two intermediate appellate courts hold that the statute is not for plaintiffs[84]

A second implicit distinction is between libel plaintiffs and plaintiffs asserting other types of injury claims. The first category are subject to the statute, while plaintiffs in the second classification are not. Yet both are "similarly circumstanced," because both are raising claims for injury in Texas courts of general jurisdiction.[85] Therefore, under the Fourteenth Amendment, both classes should be treated alike.[86] But the Texas Legislature has created an arbitrary classification. And the classification violates Santiago's equal protection under the law.

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82 *A. H. Belo Corp. v. Cocoran,* 52 S.W.3d 375, 377 (Tex. App.–Houston [1st Dist.] 2001, no pet.).

83 Tr. 9:12-14; 38:2-5;

84 *Rogers v. Cassidy,* 946 S.W.2d 439, 422 (Tex. App.—Corpus Christi 1997, no writ hist.) *overruled in part on other grounds, Huckabee v. Time Warner Entertainment,* 19 S.W.3d 413 (Tex. 2000); *TSM AM-FM TV v. Meca Homes, Inc.* 969 S.W.2d 448, 452 (Tex. App.---El Paso 1998, pet. denied).

85 *Reed v. Reed,* 404 U.S. 71, 76 (1971).

86 *Id.*

None of the classifications mentioned are "suspect," because they are not based on race, alienage, or ancestry.[87] Therefore, rational basis review is the appropriate test for Santiago's Equal Protection claim.

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause."[88] Therefore, the burden is on Santiago to show that the classifications are not rationally related to any legitimate state purpose;[89] or, that the classifications are "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[90] The question boils down to: Why are libel plaintiffs not allowed to proceed to trial when they defeat defendants' summary judgement motions, but all other tort plaintiffs are permitted to proceed to trial in the same circumstances?

The only possible answer is that media defendants are deemed by the Texas Legislature to merit "special solicitude"[91] at summary judgement. However, *Calder* says that such solicitude is denied a defendant in the context of a defamation case, because it is a form of "double counting"-- that is, it applies the *Sullivan* or *Gertz* balance twice: once in the substantive law of the case, and again at a procedural juncture in the same

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87 *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312 & n.4 (1976).

88 *Parham v. Hughes,* 441 U.S. 347, 351 (1979).

89 *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 39-40 (1973).

90 *Parham,* 441 U.S. at 352.

91 *Calder,* 465 U.S. at 786.

case.[92]

The *Calder* prohibition, which simply recognizes that *Sullivan* and *Gertz* are the law, must hold true in Texas defamation cases, in the same way it holds true in the other forty-nine states. Texas can have no legitimate purpose in seeking to overrule the supreme law of the land by legislative enactment.[93]

> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgements of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery...'[94]

The Texas Legislature disrespects the basic tenets of our government. The law they passed must therefore be irrational. This Court should nullify it.

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92 *Id.* at 790.

93 See note 6, and note 67, *supra.*

94 *Cooper v. Aaron,* 358 U.S. 1, 18 (1958) (quoting *United States v. Peters,* 5 Cranch 115, 136 (1809)).

CONCLUSION

Santiago's writ should be granted because this Court is the only governmental body, now, that can prevent the continuing and "serious erosion of federal policy"[95] that the Texas statute represents.

Respectfully submitted,

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95 *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 483 (1975).

CERTIFICATE OF SERVICE

I certify that three copies of petitioner's Petition for Writ of Certiorari have been served by mail on the following parties:

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Supreme Court, U.S.
FILED

(2)

No. 011818 JUN 13 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

ANGEL SANTIAGO,
Petitioner,

V.

K-SIX TELEVISION, INC., DEVIN HELMES, AMANDA SALINAS, ANAHI GARCIA, DAVID CORTEZ, JUAN ZAMORA, ALFONSO HOLGUIN, JUAN RAMIREZ, AND PAUL RAYMOND BUITRON, III.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

---

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162 pp

No.

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APPENDICES

Petitioner's Petition for Writ of Mandamus in the Supreme Court of Texas. . . . . A

Order On Petition for Writ of Mandamus. . . . . B

Opinion and Order in the Texas Fourth Court of Appeals. C

Trial Court's Order on K-Six' 'Traditional' Motion for Summary Judgment. . . . . D

Trial Court's Order on K-Six' 'No-Evidence' Motion for Summary Judgment. . . . . E

Transcript of Trial Court Hearing on Summary Judgment. . . . . F

Petitioner's Motion for Rehearing and Order of the Fourth Court of Appeal. . . . . G

Transcript; Texas Senate State Affairs Committee Hearing. . . . . H

National Center for State Courts, *Tort Filings—Selected Years* I

Interlocutory Appeals Statute-50 States-Summary. . . . . J

New York Interlocutory Appeals Statute. . . . . K

Arkansas Interlocutory Appeals Statute.. L

Original Proceeding No._____

IN THE

SUPREME COURT

OF TEXAS

From the Fourth Court of Appeals

at San Antonio, Texas

In re ANGEL SANTIAGO, Relator

PETITION FOR WRIT OF MANDAMUS

Emergency Relief Requested

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Original Proceeding No._____

IN re ANGEL SANTIAGO,

RELATOR

IDENTITY OF PARTIES AND COUNSEL

Relator certifies that the following is a list of all parties and all counsel in this matter:

1.) Relator is Angel Santiago, Jr., who is plaintiff in the underlying case. The attorney representing Relator is:

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2.) Respondents in this matter are: The Honorable Chief Justice, Phillip D. Hardberger; The Honorable Justice Alma L. Lopez; The Honorable Justice Paul W. Green; all of the Fourth Court of Appeals in San Antonio, Texas.

Fourth Court of Appeals
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300 Dolorosa, Suite 3200
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3.) The real parties in interest in this case are: K-Six Television, Inc., Devin Helmes, Amanda Salinas, Anahi Garcia, David Cortez, and Juan Zamora. Collectively they are known as the "media defendants" in this case. All are represented by:

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4.) The non media defendants in this case are: Alfonso Holguin, Juan Ramirez, and Paul Raymond Buitron III. They are not parties to the appeal complained of in this petition. Holguin and Ramirez are represented by:

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TABLE OF CONTENTS

Identity of Parties and Counsel. . . . . i, ii

Index of Authorities. . . . . iv, v, vi

Statement of the Case. vii

Statement of Jurisdiction. vii

Issue Presented. viii

Statement of Facts. 1

Argument. 1

1. Interlocutory appeals statute must be strictly construed 1
2. What a summary judgement is 'based on' is the same as its 'grounds'. 3
3. Grounds for summary judgement must be specifically stated in the motion. 3
4. "Fair Notice" is the reason for the rule. 4
5. The media's right to an interlocutory appeal is not automatic; Texas appellate decisions require a specific reference to free speech. 4
6. K-Six' grounds have no specific reference to constitutional or statutory free speech protections. Therefore its motion could not have been "based on" such protection. 8
7. Therefore, K-Six failed to invoke § 51.014(a)(6), and the Fourth Court's exercise of jurisdiction was improper. 8

Policy Argument----Burden on Media is not Onerous. 9

Constitutioinal Argument----Harm Done to Relator. 10

Prayer. 15

Certificate of Service. 16

Verification. 17

Relator's Motion for Emergency Stay. 18

Certificate of Service. 21

Certificate of Compliance. 22

Appendix. 23

INDEX OF AUTHORITIES

U.S. Supreme Court

1. Calder v. Jones, 465 U.S. 783 (1984). 12,13

2. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 12, 13, 14

3. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). 12

4. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 12

5. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).. 14

Texas Supreme Court

1. Dickson v. Strickland, 114 Tex, 176, 265 S.W. 1012 (Tex. 1924). 11

2. Ex parte Henry, 147 Tex. 315, 215 S.W.2d 588 (Tex. 1948). 11

3. LaRouche v. Hannah, 822 S.W.2d 632 (Tex. 1992). . . . . vii, viii

4. McConnel v. Southside Indep. School Dist., 858 S.W.2d 337 (Tex. 1993). 3, 4, 10

5. New York Underwriters Ins. Co. v. Sanchez, 799 S.W.2d 677 (Tex. 1990). 2

6. Novak v. Stevens, 596 S.W.2d 848 (Tex. 1980). 1

7. Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000). 7, 10, 13

8. Univ. of Texas Southwestern Medical Center, et al., v. Margulis, 11 S.W.3d 186 (Tex. 2000). vii

9. Westchester Fire Ins. Co. v. Alvarez, 576 S.W.2d 771 (Tex. 1978). 4

Texas Appeals Courts

1. *American Broadcasting Co. v. Gill, 6 S.W.3d 19 (Tex. App.—San Antonio 1999, pet. denied) *overruled in part on other grounds, Turner v. KTRK Television Inc.,* 38 S.W.3d 103 (Tex. 2000). 5

2. America Online v. Williams, 958 S.W.2d 268 (Tex. App.—Houston [14th Dist.] 1997, no pet. 2

3. *A. H. Belo Corp. v. Corcoran, 52 S.W.3d 375 (Tex. App.—Houston [1st Dist.] 2001, no pet. 5, 7, 9

4. *Delta Air Lines v. Norris, 949 S.W.2d 422 (Tex. App.—Waco 1997, pet denied). 5, 6, 9

5. *Dolcefino v. Randolph, 19 S.W.3d 906 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). 5

6. *Freedom Communications, Inc. v. Brand, 907 S.W.2d 614 (Tex. App.—Corpus Christi 1995, no writ. 5, 6, 9

7. *Galveston Newspapers, Inc. v. Norris, 981 S.W.2d 797 (Tex. App.—Houston [1st Dist] 1998, pet. denied) 5

8. In re Cornyn, 27 S.W.3d 327 (Tex. App.—Houston [1st Dist] 2000, no pet.). vii

9. *KTRK Television, Inc. v. Fowkes. 981 S.W.2d 779 (Tex. App.—Houston [1st Dist] 1998, pet. deined) *overruled in part on other grounds, Turner v. KTRK Television, Inc.* 38 S.W.3d 103 (Tex. 2000). 5, 6, 7, 9, 12

10. Montgomery County, Texas v. Fuqua, 22 S.W.3d 662 (Tex. App.—Beaumont 2000, pet. denied) 2

11. Pettitte v. SCI Corp., 893 S.W.2d 746 (Tex. App.—Houston [1st Dist.] 1995, no writ). 4

12. Roberts v. Southwest Texas Methodist Hospital, 811 S.W.2d 141 (Tex. App.—San Antonio 1991, writ denied). 10

13. *Rogers v. Cassidy, 949 S.W.2d 439 (Tex. App.—Corpus Christi, 1997, no writ). 5, 6

14. Scoggins v. Southwestern Electric Serv. Co., 434 S.W.2d 376 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.). 11

15. Texas Dept. of Transp. v. City of Sunset Valley, 8 S.W.3d 727 (Tex. App.—Austin 1999, no pet.). 2

16. *Texas Monthly, Inc. v. Transamerican Natural Gas Corp., 7 S.W.3d 801 (Tex. App.—Houston [1st Dist.] 1999, no pet.). 5

17. *Time Warner Entertainment Co. L.P. v. Hebert, 916 S.W.2d 47 (Tex. App.—Houston [1st Dist] 1996, no writ). 5

18. *TSM AM-FM TV v. Meca Homes, Inc. 969 S.W.2d 448 (Tex. App.—El Paso 1998, pet. denied). 5, 7

Codes and Statutes

1. Texas Constitution article 1, §8. 10

2. Texas Constitution article 1, §13. 10

2. Texas Constitution article 5, §3. vii

3. Tex. Civ. Prac. & Rem. Code § 51.014a(6) (Vernon's 1997) . . . . . vii, viii, 1, 2, 4-12

4. Tex. Gov't Code §22.002(a) (Vernon's 1997). vii

5. Tex. R. Civ. P. 166a(c). 3, 4, 6, 8, 10

6. Tex. R. App. P. 33.1(a) 8

Other

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Statement of the Case.

1. The underlying case is a suit for defamation, brought by Angel Santiago, Jr. against K-Six Television, Inc., it's employees, and three non-media defendants, who are not parties to the appeal.

2. Relator complains that a three-judge panel of the Fourth Court of Appeals erroneously exercised jurisdiction over an interlocutory appeal brought by the media defendants under Section 51.014(a)(6) of the Texas Civil Practice and Remedies Code.

Statement of Jurisdiction.

This Court has jurisdiction to issue a writ of mandamus under Texas Constitution article 5, §3, and under Section 22.002(a) of the Texas Government Code. "[M]andamus will lie to prevent a court from exercising jurisdiction it does not have, even if there is an adequate remedy by appeal. *In re Cornyn,* 27 S.W.3d 327, 332 (Tex. App.——Houston [1st Dist.] 2000, no pet.). "[E]ven when an appeal is interlocutory, we have jurisdiction to determine whether the court of appeals has jurisdiction of the appeal." *Univ. of Texas Southwestern Medical Center, et al., v. Margulis,* 11 S.W.3d 186, 187 (Tex. 2000).

Compelling Reason.

This petition for writ of mandamus has not first been filed in the Fourth Court of Appeals because of the emergency nature of the request. As in *LaRouche v. Hannah,* 822 s.w.2d 632, 633-34 (Tex. 1992), there are compelling reasons to file the mandamus directly in the Supreme Court

without first filing it in the court of appeals. The compelling reason for not dong so, is that relator here complains of the wrongful exercise of jurisdiction by that very Court. It would be futile to ask the Fourth Court of Appeals to issue a writ of mandamus against itself.

Issue Presented.

The question presented by this petition is one that involves the construction and application of a relatively new statute. The case is one of first impression because this Court has not yet ruled on the application of Tex. Civ. Prac. & Rem. Code §51.014(a) (6). Also, there is a conflict among the appeals district about how to apply the statute.

ISSUE: The Fourth Court of Appeals erroneously exercised appellate jurisdiction over an interlocutory appeal, brought under color of Texas Civil Practice and Remedies Code § 51.014a(6), where the grounds stated in appellant's motion for summary judgement made no reference to the free speech or free press clauses of the U.S. or Texas Constitutions, or Chapter 73 of the Texas Civil Practice and Remedies Code.

Statement of Facts.

The underlying defamation suit was initiated in October 2000, as a result of statements made in two news broadcasts by KVTV, Channel 13, Laredo, Texas. At the time of the broadcast, KVTV was owned by K-Six Television Inc., of Corpus Christi.

On July 11, 2001, K-Six filed a 'no evidence' motion for summary judgement, and a 'traditional' motion for summary judgement in the trial court, the 111th District Court of Webb County, Texas. Apx. tab B & C. Neither of K-Six' motions for summary judgement stated that they were based on the free speech or free press clauses of the Constitution, or on Chapter 73 of Texas Civil Practice and Remedies Code. Apx. tab B & C. After a hearing, both of K-Six' motions were denied. Apx. tab D & E. K-Six filed a notice of appeal. citing Tex. Civ. Prac. & Rem. Code § 51.014a(6) as the statute authorizing the interlocutory appeal. Apx. tab F. In his appellate brief, Relator challenged the Fourth Court's jurisdiction under that statute. Apx. tab G. However, in the opinion handed down on Feb. 13, 2002, the Court decided that its jurisdiction was proper "because appellant's motions relied in part on the law of libel found in Chapter 73 of the Code." Apx. tab A.

Argument and Authorities.

1. Interlocutory appeals statute must be strictly construed.

Generally, the denial of a litigant's motion for summary judgement is not an appealable order. *Novak v. Stevens,* 596 S.W.2d 848, 849 (Tex. 1980). The denial of a summary judgement is an interlocutory order. Appellate courts do not have jurisdiction over appeals from interlocutory orders, absent a specific grant from the legislature. *New York Underwriters Ins. Co. v. Sanchez,* 799 S.W.2d 677, 678-79 (Tex. 1990).

Chapter 51.014 of the Texas Civil Practice and Remedies Code

provides several exceptions to the general rule. One such exception can apply to media defendants. The relevant part of the statute provides:

> (a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:
>
> > (6) denies a motion for summary judgement that is based in whole or part upon a claim against or defense by a member of the electronic or print media, acting in such a capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73;
>
> Tex. Civ. Prac. & Rem. Code § 51.014(a)(6).

At least three Texas appeals courts have held that the statute authorizing interlocutory appeals must be strictly construed because it "is a narrow exception to the general rule that only final judgements and orders are appealable." *Montgomery County, Texas v. Fuqua,* 22 S.W.2d 662, 665 (Tex. App.——Beaumont 2000, pet. denied); *Tex. Dept. of Transp. v. City of Sunset Valley,* 8 S.W.3d 727, 730 (Tex. App.——Austin 1999, no pet.) (*citing America Online, Inc. v. Williams,* 958 S.W.2d 268, 271 (Tex. App.——Houston [14th Dist.] 1997, no pet.)).

2. What a summary judgment is 'based on' is the same thing as its 'grounds.'

It is a fair reading of the statute to say that, in order to invoke appellate jurisdiction, the media defendant's summary judgement motion must be

based——at least in part---on constitutional or statutory protections of free speech or press. Therefore, the motion, and what it is 'based on,' are the focus of the present inquiry. What were K-Six' motions based on? The logical place to look for an answer is in the statement of grounds presented by K-Six in its summary judgement motions. Apx. tab B & C.

The verb 'to ground' and the word 'base' are related to each other:

> **ground,** vb. 1. To provide a basis for (something, e.g. a legal claim or argument)...2. To base (something, e.g. a legal principle or judicial decision) on...
>
> *Black's Law Dictionary* 710 (Bryan A. Garner ed., 7th ed., West 1999). Therefore, what a motion for summary judgment is 'based on,' is the same thing as its 'grounds.'

3. Grounds for summary judgement must be specifically stated in the motion.

Texas law is well settled that "[a] motion for summary judgement shall state the specific grounds therefore." Tex. R. Civ. P. 166a(c); *McConnell v. Southside Indep. School Dist.,* 858 S.W.2d 337, 341 (Tex. 1993) (holding that "a motion for summary judgement must itself expressly present the grounds upon which the motion is made"). The *McConnell* Court went on to note that "...if the ground are not expressly presented in the motion itself, the motion is legally insufficient as a matter of law." *Id.* at 342. Therefore, for K-Six to have successfully invoked appellate jurisdiction over its interlocutory appeal, it must have complied both with § 51.014(a)(6) Tex. Civ. Prac. § Rem. Code and Tex. R. Civ. P. 166a(c), by

stating expressly and specifically, in the grounds for summary judgement, that it was relying on some constitutional guarantee of free speech.

4. Fair Notice is the reason for specificity.

The reason for the "admittedly rigorous rule" of specificity in 166a(c) goes to the issue of notice. *McConnell,* 858 S.W.2d at 341. "Rule 166a(c) is important because it provides the opposing party with notice of all matters expected to be asserted in arguing the motion." *Id; Westchester Fire Ins. Co. v. Alvarez,* 576 S.W. 771, 772 (Tex. 1978) (noting that "the purpose of the requirement [of specificity] is to provide the opposing party with adequate information for opposing the motion); *Pettitte v. SCI Corp.,* 893 S.W.2d 746, 747 (Tex. App.——Houston [1st Dist.] 1995, no writ) (stating that the requirement of specificity is satisfied, if the grounds in the motion give "fair notice" to the non-movant). 'Fair notice' has long been a requirement of jurisdictional and even constitutional importance. It is a mainstay of American jurisprudence.

5. The media's right to an interlocutory appeal is not automatic; Texas appellate decisions require a specific reference to free speech protections.

Several Texas Appeals Courts have directly tackled the issue presented by this petition: Did the appellant properly invoke higher court jurisdiction according to § 51.014a(6). *See* all cases marked with an asterisk (*) in the Index of Authorities, *supra,* at iv-vi. The procedural posture of the cases so marked is the same as in the present case. In half of the cited cases, the Courts concluded that their jurisdiction was proper without stating or

showing how the appellants complied with the statute. The Court in *Texas Monthly* even seemed to suggest that the right to an interlocutory appeal was automatic, simply when the defendant is a member of the media. 7 S.W.3d at 813, n.1. However, nothing in § 51.014(a)(6) says, or even implies, that the media's right to an interlocutory appeal is automatic. The legislature could have easily made it so, but did not. Therefore, the media defendant must first 'do something' in order to invoke the right.

Delta Air Lines and the five cases that follow show what the media defendant must do. 949 S.W.2d 422. In *Delta Air Lines,* the defendant "...moved for summary judgment on three causes of action [sic] asserting (1) that the claims for defamation and business disparagement must fail because the alleged statements were either 'non-defamatory or non-actionable statements of opinion' protected by free speech rights; (2) alternatively, that the statements were substantially true; and (3) that Norris' claim for intentional infliction of emotional distress fails because..." 949 S.W.2d at 425.

Because one ground in Delta's motion for summary judgement contained a specific reference to "free speech rights," the Waco Court properly held it had jurisdiction over the appeal. 949 S.W.2d at 424. Delta thus complied with § 51.014a(6) and Tex. R. Civ. P. 166a(c) by specifically referring to a constitutional defense in its grounds for summary judgment. This is what gets an appellant covered by the statute.

Support for this way of invoking appellate jurisdiction is also found in *Freedom Communications Inc. v. Brand,* 907 S.W.2d 614 (Tex. App.—

Corpus Christi 1995, no writ). The Court in *Freedom Communications* concluded it had proper jurisdiction over Freedom's appeal because it found this language in Freedom's motion for summary judgement: "the editorial published by the FREEDOM DEFENDANTS [sic] carries absolute protection from liability under the First Amendment and the Texas Constitution as none of the challenged statements was published with actual malice." *Id.* at 619.

The statement above was held to have invoked the Court's jurisdiction expressly because it complied with both the relevant statutes: § 51.014(a)(6), and the specificity requirement under Tex. R. Civ. P. 166a(c). *Id.*

In another Corpus Christi case, appellate jurisdiction over the media defendant's interlocutory appeal was found to be proper on the basis that "he was engaging in constitutionally protected political speech." *Rogers v. Cassidy,* 946 S.W.2d 439 (Tex. App.——Corpus Christi 1997, no writ). This statement was contained in ground two of defendant's motion for summary judgment. *Id.*

The Houston Court of Appeals for the First District falls in line with the holdings in *Delta Air Lines, Freedom Communications, and Rogers.* In *KTRK v. Fowkes,* 981 S.W.2d 779 (Tex. App.——Houston [1st Dist.] 1998, pet. denied) *overruled in part on other grounds, Turner v. KTRK Television, Inc.,* 38 S.W.3d 103 (Tex. 2000), the Court found that the media appellant defended the libel claim on free speech grounds. The affirmative statement of grounds was: "(2) that Dolcefino's conduct

was a bona fide exercise of his first amendment rights." Id. at 787.

In *A.H. Belo Corp. v. Corcoran,* the same Court found it jurisdiction proper under 51.014(a)(6) where the appellants' motion for summary judgment stated, as ground for summary judgment # 7: "imposing liability on appellants for engaging in routine news gathering is a violation of the First Amendment." 52 S.W.3d 375, 378 & n.1.

In the case of *TSM AM-FM TV,* the El Paso Court of Appeals denied a defamation plaintiff the right to appeal under § 51.014(a)(6); saying, correctly, the statute is meant for defendants only. 969 S.W.2d *supra,* page v., at 451. But, in dicta, the Court underscored the necessity of expressly referring to free speech protections:

> Even if we were to find that Meca and Mashburn could appeal, the grounds for summary judgment that they relied upon do not meet the requirements of Section 51.014(6). Meca and Mashburn's grounds for summary judgment were not based on either the First Amendment to the United States Constitution, Article I, § 8 of the Texas Constitution, or Chapter 73 of the Civil Practice and Remedies Code. We can find no authority that would confer jurisdiction upon this Court...
>
> *Id.*

These six cases demonstrate that some reference to free speech, or the Constitution, or free press, or even Chapter 73 must be specifically stated in the media defendant's grounds for summary judgment. Otherwise, they do not qualify for the right to an an interlocutory appeal. The exception is narrow. This requirement, although technical, is reasonable because it

square with Tex. R. Civ. P. 166a(c); with the meaning of 'based on' in 51.014(a)(6); and with Tex. R. App. P. 33.1(a), which states:

> (a) In general. As a prerequisite to presenting a complaint for appellate review the record must show that:
>
> > (1) the complaint was made to the trial court by a timely request, objection, or motion that: (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint...

6. K-Six' grounds show no specific reference to constitutional or statutory free speech protections. Therefore, K-Six failed to invoke § 51.014(a)(6), and the Fourth Court's exercise of jurisdiction was improper.

K-Six' motion for summary judgment under 166a(c) is found in *Appendix,* tab B. K-Six 'no-evidence' motion for summary judgment is found in *Appendix,* tab C. The grounds stated in the motions are found beginning on page 7, and in paragraph 4, respectively. Nowhere is to be found the kind of specific reference that the decisions cited *supra* say is required to invoke appellate jurisdiction. K-Six therefore did not comply with the requirements of the statute.

The absence of "actual malice" may be consiodered a constitutionally-derived defense to a libel. And the absence of malice is stated in K-Six' motions. But, the judicial interpretations of § 51.014(a)(6), as cited above, hold that that is not enough. There must be a statement similar to those found in *Delta, Freedom Communications, Rogers, Fowkes,* and *A. H. Belo.* [citations omitted].

The Respondents failed to consider the judicial interpretations as to what must be done before there jurisdiction over K-Six' appeal would be proper. If the Respondents did consioder the decisions, then they ignored precedent coming out of the First District in Houston. The Eighth District in El Paso, the Tenth Court in Waco, and the Thirteenth Court in Corpus Christi. The Fourth Court's decison in this case, therefore presents a conflict which should be resolved by this Court.

Policy Argument----Burden on the Media is Not Onerous.

Some may argue that the requirement of making a specific reference to free speech protections is overly technical. It may well be. But the law is sometimes very technical. If the indictment does not state: "Against the Peace and Dignity of the State," a conviction will be overturned. If the motion does not say: "this continuance is not for delay only, but so justice may be done," then the trial is today----not tomorrow, or next week.

Some may argue that the requirement of having to expressly reference the protections of free speech in the grounds for summary judgement is onerous or unduly burdensome for the media defendant. It is not. Any additional burden on K-Six in this case would have consisted only in: 1.) becoming aware of the appellate decisions mentioned in this petition; and 2.) a few keystrokes on the word processor, coupled with a few milligrams of extra toner. These represent no burden at all.

There are four other reasons why any incremental burden on the media is warranted. First, because, Tex. R. Civ. P. 166a(c) requires specificity. *McConnel,* 858 S.W.2d at 339. And Rule 166a(c) governs all motions for summary judgement, even ones from the media. Second, there is no other way for the trial court, the plaintiff, or the appeals court to know that the defendant is asserting a defense 'arising under' constitutional or statutory provisions. Tex. Civ. Prac. & Rem., Code § 51.014(a)(6). Third, the requirement furthers the judicial standard of strictly construing an exception to the general rule that only final orders may be appealed.

Finally, in the case of *Roberts v. Southwest Texas Methodist Hospital,* 811 S.W.2d 141, 145 (Tex. App.——San Antonio 1991, writ denied), it was observed: "[t]here is nothing onerous or unreasonable about requiring the movant to state the grounds upon which he seeks to win a lawsuit without a trial." Likewise, there is nothing burdensome about requiring K-Six Television to add the words, 'protected by the First Amendment' to one of its grounds for summary judgment, if it wants to win this lawsuit without a trial.

Constitutional Argument----Harm Done to Angel Santiago.

The Texas Constitution give Angel Santiago the right to bring his defamation claim against K-Six Television. Tex. Const. art I, §8 & § 13; Turner v. KTRK Television, Inc., 38 S.W.3d 103, 116-17 (Tex. 2000)

(holding that the Texas Constitution expressly guarantees the right to bring reputational torts; and that the free speech guarantee in the Texas Constitution---although broad---"cannot come at the expense of a defamation claimant's right to redress."). Yet, Santiago's right to redress---as fundamental as it is---has been cut off by the improvident exercise of jurisdiction over K-Six' interlocutory appeal.

When a statute bumps up against the Constitution, as a general proposition, the statute must yield. *Scoggins v. Southwestern Electric Serv. Co.,* 434 S.W.2d 376 (Tex. Civ. App.——Tyler 1968 writ ref'd n.r.e.); *Ex Parte Henry,* 147 Tex. 315, 215, S.W.2d 588 (Tex. 1948); *Dickson v. Strickland,* 114 Tex. 176, 265 S.W. 1012 (Tex. 1924). Here, Santiago is not so much concerned with the ultimate constitutionality (under Texas law) of § 51.014(a)(6), as with the practical effect of its too liberal application.

The practical effect is that Santiago is completely denied relief. At times, a libel plaintiff may want to reject money damages, and opt instead for normal damages and a trial judgement that the injurious statements made against him are false. This would have the salutary and much-desired effect of vindicating his reputation. Yet, by the operation of 51.014(a)(6), even this form of relief is denied Santiago. In this, he is not alone. In 10 of the 11 cases cited with an asterisk at the Index of Authorities, *supra* at iv-vi, the appellate courts reversed and rendered judgement in favor of the media defendant. The plaintiff took nothing. That means, that by operation of this statute, 91% of all defamation plaintiffs are effectively denied all

possible forms of relief. (Except for that pre-civilized form of relief---taking the law into one's own hands). Perhaps this is what the Texas Legislature intended. But the substantial nature of the two competing rights would predict, in a real world, an outcome closer to 50-50——as in an evenly-matched fight.

We are told that the purpose of the Texas statute is to protect media defendants from meritless libel claims, and "to eliminate the chilling effect that the threat of extended litigation has upon the exercise of the protections secured by the First Amendment." *Fowkes,* 981 S.W.2d 779, *supra,* p.6, at 787-786. Yet, at least one court has already determined that Santiago's claim is not meritless. Apx. tab D & E. The second stated purpose, while laudable, seems outside the purview of a state legislature.

The U.S. First Amendment protection described in *Fowkes, supra,* have already been secured to the media---and everybody else---by well-settled U.S. constitutional decisions. *See New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *and See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 773 & 781-84 (1985) (holding, 9 to 0, that "the First Amendment gives no more protection to the press in defamation suits than it does to other exercising their freedom of speech") (White, J., concurring, and Brennan, J., dissenting). With this knowledge, it would seem that even purely Texas-based media do not need any extra help from the Texas Legislature to secure their free speech rights granted by the U.S. Constitution.

The U.S. Supreme Court has flatly said as much. In *Calder v. Jones,* 465 U.S. 783, 790-91 (1984), the Court said:

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.

Thus, the "special procedural protection" granted by the Texas Legislature to the media in § 51.014(a)(6) is superfluous, and a form of overkill. And it undervalues Santiago's "right to redress." What is more, the operation of Texas statute was expressly denounced by the Court in *Calder,* nine years before § 51.014(a)(6) was passed by the Texas Legislature. In *Calder* the Court said that the [U.S.] Constitution does not require any special rules to apply at summary judgement in a defamation case. *Id.*

Indeed, this Court, in the context of a public-figure libel case, said: "We see no need, therefore, to impose an additional barrier to recovery not required by the U.S. Constitution." *Turner,* 38 S.W.3d, *supra,* p. 10, at 116. In this case, 51.014(a)(6) has been shown to be a barrier to Santiago's recovery. And under *Calder,* the barrier is not required by the U.S. Constitution.

On the other side of the balance sheet, Santiago' interest in the protection of his own good name has been found by the U.S. Supreme

to be "strong and legitimate." *Dun & Bradstreet,* 472 U.S. *supra,* p. 12, at 757. And, in an eloquent and oft-cited phrase, Santiago's interest in vindicating his reputation has been considered to be worthy itself of U.S. Constitutional protection:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being——a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.
> *Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966) (Stewart, J. concurring) (quoted in *Dun & Bradstreet, supra,* at 757-58).

When two great and fundamental legal rights contend, the fight over the boundary line between them is likely to be hotly disputed. And the resolution of the boundary is likely to rest on very fine distinctions---e.g. technical criteria. Because Santiago's fundamental interests are substantially undervalued by the operation of § 51.014(a)(6), this Court should err on the side of having the media defendant endure the (slight) burden of conforming to the technicality, if he wants immediate review. At least five media defendants in Texas have already proven that they can conform to the requirements of the statute. K-Six can do it too.

Therefore, in the face of the legitimacy of Santiago's substantial interest, it is not unreasonable for this Court to construe § 51.014(a)(6) in

the way proposed by this petition; that is by requiring the media defendants to expressly state in his grounds for summary judgement that he is basing his defense on the Constitution. Such a ruling would give equal dignity to the weighty and opposing values at stake.

Prayer.

For the foregoing reason, Relator asks this Court to grant his petition; grant his request for emergency stay; issue a Writ of Mandamus requiring Respondents to vacate their judgement and opinion of February 13, 2002 for want of proper jurisdiction over K-Six' appeal; and affirm the trial court's orders denying summary judgement.

Respectfully submitted,

Edward P. Fahey, Jr.
State Bar # 24009400
1800 Victoria Suite 2
Laredo, Texas 78040
Tel: (956) 753-0964
Fax: (956) 723-1606
ATTORNEY FOR RELATOR,
ANGEL SANTIAGO

CERTIFICATE OF SERVICE

I certify that I served by U.S. mail, on March 14, 2002, a copy of this petition for writ of mandamus on the following parties:

_____

Edward P. Fahey, Jr.

1. The attorney for the real parties in interest—

Jorge C. Rangel
William E. Maxwell
The Rangel Law Firm, P.C.
615 Upper North Broadway, Suite 2020
Corpus Christi, Texas 78477

2. The respondents, the Honorable Chief Justice, Phillip D. Hardberger; the Honorable Justice Alma L. Lopez; the Honorable Justice Paul W. Green; of the Fourth Court of Appeals, in San Antonio, Texas—

Fourth Court of Appeals
Bexar County Justice Center
300 Dolorosa, Suite 3200
San Antonio Texas 78205-3037

VERIFICATION

STATE OF TEXAS §
COUNTY OF WEBB §

Before me, the undersigned notary, on this day, personally appeared Edward P. Fahey, Jr. a person whose identity is known to me. After I administered the oath to him, upon his oath, he said the following.

"My name is Edward P. Fahey, Jr., and I am capable of making this affidavit and the facts in this affidavit are true and correct.

I am the attorney for the relator. All the documents included with this petition for writ of mandamus are true copies."

SWORN TO and SUBSCRIBED before me by Edward P. Fahey, Jr., on March 2, 2002.

Notary Public in and for the
State of Texas

My commission expires: 3/23/2004

Original Proceeding No._____

	§	
	§	
	§	
	§	**IN THE**
IN re ANGEL SANTIAGO	§	**SUPREME COURT**
	§	
	§	**OF TEXAS**
	§	
	§	
	§	

RELATOR'S MOTION FOR EMERGENCY STAY

Relator asks this Court for an emergency stay.

A. Introduction

1. Relator is Angel Santiago; real party in interest is K-Six Television, Inc., et al; respondents are: the Honorable Chief Justice Phillip D. Hardberger, the Honorable Justice Alma L. Lopez, the Honorable Justice Paul W. Green,

sitting as a panel of the Fourth Court of Appeals, in San Antonio, Texas.

2. Relator files its petition for writ of mandamus concurrently with this motion for emergency relief.

3. Relator attaches a certificate of compliance certifying that on March 12, 2002, he notified respondents and real parties in interest by fax that a motion for temporary relief would be filed. Tex. R. App. P. 52.10(a).

4. Emergency relief is requested to stay the mandate from the Fourth Court of Appeals to the trial court, the 111th District Court of Webb County, Texas, the Honorable Raul Vasquez presiding. Real parties in interest

appealed the denial of their motions for summary judgement under color of Tex. Civ. Prac. & Rem. Code § 51.014(a)(6). However K-Six failed to comply with the requirements of that statute. The Fourth Court of Appeals reversed the trial court's order and rendered judgement that Relator take nothing in his defamation claim against K-Six. In his petition for writ of mandamus filed concurrently with this motion, Relator claims that the Fourth Court of Appeals erroneously exercised its jurisdiction over K-Six' appeal because the statutory protections in § 51.014(a)(6) were not properly invoked by K-Six at the trial court.

The mandate of the Fourth Court's judgement should be stayed to give this Court time to review the construction and application of the statute.

B. Argument and Authorities

5. The Court may grant temporary relief pending the determination of an original proceeding under authority of Texas Rule of Appellate Procedure 52.10(b).

6. This emergency stay is necessary to maintain the status quo of the parties and preserve the Court's jurisdiction to consider the merits of the original proceedings, as described above. *In re Reed,* 901 S.W.2d 604, 609 (Tex. App.——San Antonio 1995, orig. proceedings).

7. The appeal of an interlocutory order, when allowed by statute, is an accelerated appeal. Tex. R. App. P. 28.1. In an accelerated appeal from an interlocutory order, the Court of Appeals may issue the mandate with its judgement, or delay the mandate until the appeal is finally disposed of Tex.

R. App. P. 18.6. In this case, the Appellate Court therefore has discretion to issue its mandate immediately. Because issuance of the mandate would foreclose on Relator's possibilities for relief when the construction and validity of a statute is in question, emergency relief should be granted. Tex. R. App. P. 56.1(a)(3); Tex. Gov't. Code § 22.001(a)(3).

C. Prayer

8. For the reasons stated in this motion, Relator asks the Court for an emergency stay to maintain the status quo of the parties and preserve the Court's jurisdiction to consider the merits of Relator's original proceeding.

Respectfully submitted,

Edward P. Fahey, Jr.
State Bar # 24009400
1800 Victoria Suite 2
Laredo, Texas 78040
Tel: (956) 753-0964
Fax: (956) 723-1606
ATTORNEY FOR RELATOR,
ANGEL SANTIAGO

CERTIFICATE OF SERVICE

I certify that I served by U.S. Mail, on March 14, 2002, a copy of this motion for emergency stay to the following parties shown below:

_____

Edward P. Fahey, Jr.

1. The attorney for the real parties in interest:

Jorge C. Rangel
William E. Maxwell
The Rangel Law Firm, P.C.
615 Upper North Broadway, Suite 2020
Corpus Christi, Texas 78477

2. Respondents: the Honorable Chief Justice, Phillip D. Hardberger, the Honorable Justice Alma L. Lopez, the Honorable Justice Paul W. Green.

Fourth Court of Appeals
Bexar County Justice Center
300 Dolorosa, Suite 3200
San Antonio Texas 78205-3037

CERTIFICATE OF COMPLIANCE

Under Texas Rule of Appellate Procedure 52.10(a), I certify that on March 12, 2002 I notified the attorney for the real parties in interest, and the clerk of the Fourth Court of Appeals, by fax that a motion for temporary relief would be filed.

_____

Edward P. Fahey, Jr.
ATTORNEY FOR RELATOR

B

THE SUPREME COURT OF TEXAS

Orders Pronounced March 19, 2002

MISCELLANEOUS

THE FOLLOWING PETITION FOR WRIT OF MANDAMUS IS DENIED:

02-0241 IN RE ANGEL SANTIAGO
motion for emergency relief denied

C

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

★ ★ ★ ★ ★ ★

JUDGMENT

NO. 04-01-00592-CV

K-SIX TELEVISION, INC., et al.,
Appellants

v.

Angel **SANTIAGO,**
Appellee

From the 111th Judicial District Court, Webb County, Texas
Trial Court No. 2000CVQ-001052-D2
Honorable Raul Vasquez, Judge Presiding

BEFORE CHIEF JUSTICE HARDBERGER, JUSTICE LÓPEZ, AND JUSTICE GREEN

In accordance with this court's opinion of this date, the trial court's orders are REVERSED, and judgment is RENDERED that appellee, Angel Santiago, take nothing with regard to his claims against appellants. It is ORDERED that the appellants recover their costs of this appeal from the appellee, Angel Santiago.

SIGNED February 13, 2002.

Alma L. López

Alma L. López, Justice

OPINION

NO. 04-01-00592-CV

K-SIX TELEVISION, INC., et al.,
Appellants

v.

Angel **SANTIAGO,**
Appellee

From the 111th Judicial District Court, Webb County, Texas
Trial Court No. 2000CVQ-001052-D2
Honorable Raul Vasquez, Judge Presiding

Opinion by: Alma L. López, Justice

Sitting: Phil Hardberger, Chief Justice
Alma L. López Justice
Paul W. Green, Justice

Delivered and Filed: February 13, 2002

REVERSED AND RENDERED

This accelerated appeal challenges the trial court's denial of both traditional and no-evidence motions for summary judgment in a defamation action against media defendants. The defamation action arose out of a story aired during two news broadcasts. The appellants contend that the trial court erred in denying their no-evidence motion for summary

judgment because no evidence was produced that the statement were false or were made negligently or with actual malice. The appellants further contend that the trial court erred in denying their traditional motion for summary judgment because the broadcasts were true or substantially true and the evidence conclusively established that the statements were not made negligently or with actual malice. We reverse the trial court's orders and render judgment in favor of the appellants.

BACKGROUND

Angel Santiago ("Santiago") sued K-Six Television, Inc. ("K-Six") and several of its employees after a story was aired on two news broadcasts regarding allegations that Santiago was responsible for funds missing from the Laredo Amateur Boxing Club, a non-profit corporation ("LABC"). Santiago was president of LABC from its inception in 1991 until June of 2000, when he resigned. As president, Santiago was the only authorized signatory on LABC's checking account, and he maintained all of the monthly statements and financial documents required by the United Way, which provided funding to LABC.

David Cortez ("Cortez"), the assignments editor for K-Six, received an unsolicited phone call from Richard Geisler regarding a possible story involving wrongdoings at LABC. Geisler provided Cortez with numerous financial documents. Cortez assigned the story to Devin Helmes ("Helmes"). Helmes set up a meeting with three LABC coaches - Alfonso Holguin, Juan Ramirez, and Paul Raymond Buitron, III. The coaches informed him that LABC was missing funds and Santiago was responsible. The coaches provided Helmes with various examples of missing funds.

The coaches informed Helmes that they had contacted the IRS and asked the IRS to investigate. The coaches further informed Helmes that Santiago had resigned because they told him they were beginning an investigation. In response to Helmes's call before airing the story, Santiago declined to comment; however, Santiago stated in his deposition that he resigned for various reasons, including false allegations that he was maliciously tampering.

Based on the information Helmes received from the coaches, K-Six aired a news story regarding the coaches' allegations of missing funds on two separate broadcasts on October 12, 2002. The first broadcast stated:

> AMANDA SALINAS: Straight ahead on Newswatch 13, there's a possible connection with the USS Cole here in Laredo. We spoke with one family member. We've got information for you.
>
> Also, stories of stealing money. Devin Helmes has an exclusive. All this, plus weather and sports are coming up on Newswatch 13.
>
> (Fade).
>
> (Commercial).
>
> ANNOUNCER: Live from the KVTV studios in Laredo, this is Newswatch 13, Thursday.
>
> AMANDA SALINAS: Good evening, everyone, and thanks for joining Newswatch 13. I'm Amanda Salinas. Newswatch 13 does have some information that a Laredo area man who is stationed in Norfolk, Virginia -
>
> (Fade).
>
> AMANDA SALINAS: - news of the moment. Members of a nonprofit club are coming forward and questioning where their funding's going. Volunteers at the Laredo Amateur Boxing Club want answers from the organization's former president as to what he did with the club's money. Our Devin Helmes met with some of the group's coaches today, and he's standing by, live in the newsroom with the latest. Devin.
>
> DEVIN HELMES: Thanks, Amanda. It's a club to keep boys and girls off the street and improve the quality of their lives, but according to some people who volunteer there, the only person benefiting from the

club is its former president.

ALFONSO HOLGUIN: And I used this money to - for to buy some supplies for the gym, but I never saw any - any - any new items there.

DEVIN HELMES: Coach Holguin and others are questioning where almost $15,000 of the organization's money went. They're curious, because they have all last year's expense report, but it doesn't make any sense. At that time, the gym was being renovated and wasn't open.

ALFONSO HOLGUIN: For the year - the reported year, I think it's $14,000. nearly $15,000 in expenditures, and the club was not operating.

DEVIN HELMES: They're alleging club president, Angel Santiago, was taking it. They say he was the only one who handled all the paperwork.

ALFONSO HOLGUIN: He had control of everything. He was the president. He was the South Texas President for the USBA. He was the treasurer. Nobody have [sic] any access of the monies except him.

DEVIN HELMES: Just this month their accountant decided to retire his post as treasurer because of a supposed busy schedule. Santiago also retired this July after the coaches told him they were investigating.

JUAN RAMIREZ: Santiago -

PERSON OFF CAMERA: Quit.

JUAN RAMIREZ: - quit because he was doing something wrong.

DEVIN HELMES: Volunteers have pages of proof that they say incriminate the former president. Apparently thousands of dollars was given to them from their supporter, United Way, and from club members in dues, money that was supposedly never given to who it really belonged, the children.

PAUL RAYMOND BUITRON, III: A lot of them see me in the streets and they tell me, "Hey, what's going on with boxing? I never got anything. I paid my dues to Laredo Boxing Club." And I go, "What do you mean you paid it to Laredo Boxing Club? It's supposed to be a check to the South Texas Amateur Boxing Association."

DEVIN HELMES: Amanda, I talked to Mr. Santiago on the phone, and he declined to comment on camera as

he said, on things he knew nothing about. But he did tell me he resigned for many reasons, one being that people weren't happy with the way he was running things down there. Now, as for the coaches, they said the IRS is looking into matters. All they want to know is where the money went, and they want it back. No lawsuits have been filed at this time, but the coaches are looking into one. Live in the newsroom, I'm Devin Helmes.

AMANDA SALINAS: Now, Devin, you say no lawsuits have been filed, and you also tell us that - or it seems to me that this would be a matter of theft. Has the Police Department been notified and maybe some sort of criminal complaint already been made on Santiago?

DEVIN HELMES: Yes. Nothing has been done so far. All they told me was the IRS was looking into things. They said they brought it to the attention of the board of directors and things like that. But at this time, there's no sort of criminal investigation going on. There's no sort of - the District Attorney is not involved, so the IRS is the only people [sic] dealing with it at this time.

AMANDA SALINAS: Okay. Thank you very much, Devin. In other news, Border Area Drug Conference continued today -

(Fade).

The second broadcast stated:

AMANDA SALINAS: - as early as tomorrow morning. It could be later. In other news from around the city, members of a nonprofit club are coming forward and questioning where their funding is going. Volunteers at the Laredo Amateur Boxing Club want answers from the organization's former president as to what he did with the money. Newswatch 13's Devin Helmes met with some of the group's coaches today. He tells us that it's a club to keep boys and girls off the streets and to improve their quality of life. But according to some people who volunteer their, the only person who benefited from this club was its former president.

ALFONSO HOLGUIN: And I used this money to- for to buy some supplies for the gym, but I never saw

any - any - any new items there.

DEVIN HELMES: Coach Holguin and others are questioning where almost $15,000 of the organization's money went. They're curious because they have all last year's expense reports, but it doesn't make any sense. At that time, the gym was being renovated and wasn't open.

ALFONSO HOLGUIN: For the year - the reported year, I think it's $14,000, nearly $15,000 in expenditures, and the club was not operating.

DEVIN HELMES: They're alleging former club president, Angel Santiago, was taking it, They say he was the only one who handled all the paperwork.

ALFONSO HOLGUIN: He had control of everything. He was the president. He was the South - South Texas President for the USBA. He was the treasurer. Nobody have [sic] any access of the monies except him.

DEVIN HELMES: Just this month their accountant decided to retire his post as treasurer because of a supposed busy schedule. Santiago also retired this July after the coaches told him they were investigating.

JUAN RAMIREZ: Santiago -

PERSON OFF CAMERA: Quit.

JUAN RAMIREZ: - quit because he was doing something wrong.

DEVIN HELMES: Volunteers have pages of proof that they say incriminate the former president. Apparently thousands of dollars was given to them from their supporter, United Way, and from club members in dues, money that was supposedly never given to who it really belonged, the children.

PAUL RAYMOND BUITRON, III: A lot of them them see me in the streets and they tell me, "Hey, what's going on with boxing? I never got anything. I paid my dies to Laredo Boxing Club." And I go, "What do you mean you paid it to Laredo Boxing Club? It's supposed to be a check to the South Texas Amateur Boxing Association."

AMANDA SALINAS: Again, that was Devin Helmes reporting, and Devin did speak to Mr. Santiago on the phone, but Mr. Santiago declined to comment on

> camera, because he said he didn't want to talk about the situation. We are told that this club has filed charges with the IRS - rather they have notified the IRS and then charges will be taken later on during this year. In other news, Border Area Drug Conference continued today at the Civic Center. Audience members -
>
> (Fade).
>
> (End of videotape).

Santiago subsequently sued K-Six and several of its employees for defamation. The appellants appeal the trial court's orders denying their traditional and no-evidence motions for summary judgment.

JURISDICTION

Santiago contends that this court does not have jurisdiction to consider this appeal because the appellants did not raise any constitutional claims or defenses in their motions for summary judgment.

Section 51.014(6) of the Texas Civil Practice and Remedies Code ("Code") permits a person to appeal a denial of a motion for summary judgment "that is based in whole or part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73 [of the Code]." TEX. CIV. PRAC. & REM. CODE ANN. § 51.104(6) (Vernon Supp. 2001). Section 73.004 of the Code requires a party complaining oF a defamatory statement published or uttered as part of a televions broadcast to prove that the broadcasting party failed to exercise due care. TEX. CIV. PRAC. & REM. CODE ANN. § 73.004 (Vernon 1997). In addition, section 73.005 of the Code provides

that truth is a defense to an action for libel. TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (Vernon 1997).

The appellants' motions for summary judgment rely in part on the law of libel contained in chapter 73 of the Code. Therefore, the entirety of the trial court's orders are appealable pursuant to section 51.014(6). *American Broadcasting Companies, Inc. v. Gill,* 6 S.W.3d 19, 26 (Tex.App.—San Antonio 1999, pet. denied), *overruled in part on other grounds, Turner v. KTRK Television, Inc.,* 38 S.W.3d 103 (Tex. 2000).

TIMELINESS OF RESPONSES AND SUMMARY JUDGMENT EVIDENCE

The appellants contend that Santiago's responses to their motions for summary judgment were untimely; therefore, this court should not consider the responses. The summary judgment hearing was held on August 17, 2001. Santiago filed a response to the traditional motion for summary judgment on August 13, 2001, a response to the no-evidence motion for summary judgment on August 13, 2001, and a first amended reponse to the no-evidence motion for summary judgment on August 17, 2001. Both of the responses and the first amended response state that they are untimely filed.

A response to a motion for summary judgment, including opposing summary judgment evidence, may be filed no later than the seventh day before the date of the hearing "[e]xcept on leave of court." Tex. R. Civ. P. 166a(c); *Neimes v. Ta,* 985 S.W.2d 132, 139 (Tex. App.—San Antonio 1998, pet. dism'd by agr.). The record must contain an affirmative indication that the trial court permitted the late filing of a response or the response is a nullity. *Neimes v. Ta,* 985 S.W.2d at 139. If the record contains nothing indicating that the trail court considered a late-filed

response,we presume the trail court did not consider it, and the response will not be considered on appeal. *Id.* Permission to file a late response may be reflected in a recital in the summary judgment. *Id.*

In this case, each of the orders denying appellants' motions recite that the trial court considered the response. Neither order recites that the trial court considered the amended response. Therefore, this court will presume that the trial court did not consider the amended response, and we will not consider the amended response on appeal. *See id.*

The appellants note that the appendix to Santiago's brief contains deposition exhibits that were not on file with the trial court. Although we can consider the depositions contained in our clerk's record that were on file at the time of the summary judgment hearing and were referenced in Santiago's response, we cannot consider the exhibits to those depositions which were not on file with the trial court and are not contained in our clerk's record. *See* Tex. R. Civ. P. 166a(c); *Till v. Thomas,* 10 S.W.3d 730, 733-34 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding appellate courts cannot consider documents attached to briefs that do not appear in the appellate record).

STANDARD OF REVIEW

The appellants filed both a traditional motion for summary judgment and a no evidence motion for summary judgment.

Under traditional summary judgment standards, a party moving for summary judgment has the burden of establishing as a matter of law that no genuine issue of material fact exists as to one or more essential elements of the plaintiff's cause of action. *Casso v. Brand,* 776 S.W.2d 551, 556 (Tex. 1989); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546-

548-49 (Tex. 1985). If the defendant meets this burden, the plaintiff must then

raise a genuine issue of material fact on that element. *Gonzalez v. City of Harlingen,* 814 S.W.2d 109, 112 (Tex. App.—Corpus Christi 1991, writ denied). In reviewing a summary judgment, an appellate court accepts as true all evidence supporting the non-movant. *Nixon,* 690 S.W.2d at 549. All inferences are indulged in favor of the non-movant, and all doubts are resolved in his favor. *Id.*

We apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Moore v. K-Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied). We look at the evidence in the light most favorable to the respondent against whom the summary judgment was rendered, disregarding all contrary evidence and inferences. Moore, 981 S.W.2d at 269. A no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. *Id.* Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Id.* More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.*

NEGLIGENCE/ACTUAL MALICE

One ground on which the appellants moved for both a traditional and a no-evidence summary judgment was the absence of fault.

The appellants contend that Santiago was public figure and, as such,

the applicable "fault" standard was actual malice. Alternatively, the appellants argue that even if negligence was the applicable standard, Santiago did not produce any evidence of negligence and the absence of negligence was conclusively established.

For purposes of this appeal, we will assume, without deciding, that Santiago is not a public figure and that the applicable "fault" standard is negligence. Under this standard, Santiago is only entitled to recover if he shows that the appellants were negligent with regard to the alleged falsity of the broadcast. *Foster v. Laredo Newspapers, Inc.*, 541 S.W,.2d 809, 819-20 (Tex. 1976).

A. No Evidence

The appellant's no-evidence motion for summary judgment asserted, "there is no evidence that the broadcasts or statements contained therein were false; there is no evidence that K-Six broadcast the statements with actual malice; and there is no evidence that K-Six was negligent in the broadcast or in the airing of the statements complained of." In response to the appellants' no-evidence motion for summary judgment on this issue, Santiago was required to produce a scintilla of evidence to show that the appellants has acted negligently. The only evidence produced in response to the no evidence motion was a transcript of the broadcasts. Nothing contained in the transcript evidences any negligence on the part of the appellants.

Santiago states in his brief that "[a] transcript of Helmes deposition was given to the court. And in oral argument, the negligence points set forth in

section 4 of this brief were recited to the court. It's in the transcript of the hearing." Our record does not contain a transcript of the hearing, and the response to the no-evidence motion for summary judgment does not rely on the transcript of Helmes's deposition to point out specific instances of negligence.

The trial court erred in denying the no-evidence motion for summary judgment because Santiago failed to produce a scintilla of evidence to show that the appellants had acted negligently.

A. Traditional

The appellants also moved for summary judgment on traditional ground contending that as a matter of law no genuine issue of material fact existed as to the negligence element of Santiago's claim.

Helmes affidavit, which was attached to the motion, detailed the steps he took in investigating the story and checking several sources. In addition, the appellants presented the affidavit of an expert, a journalism professor, who reviewed the investigation undertaken in view of the applicable standard of care and opined that the appellants did not act negligently.

Santiago counters that Helmes was a young reporter whose story was not reviewed for defamatory content. Although Helmes' story was not reviewed by the station manager, the producer told Helmes to verify his facts after she was informed of the nature of the story. Santiago complains that the appellants were negligent by not investigating further;' however, Santiago offered no evidence to support his assertions regarding the facts additional investigation would have revealed. Therefore, no evidence is

contained in our record that controverts the nature of the investigation undertaken by Helmes or the expert's opinion that such investigation was not negligent.

The trial court erred in denying the traditional motion for summary judgment because the appellants established as a matter of law that no genuine issue of material fact existed as to the negligence element of Santiago's claim.

CONCLUSION

The trial court's orders are reversed, and judgment is rendered that Angel Santiago take nothing with regard to his claims against appellants.

Alama L. Lopez, Justice

PUBLISH

CAUSE NO. 2000CVQ-001052-D2

FILED
WEBB COUNTY, TEXAS
MANUEL GUTIERREZ
CLERK OF THE DIST. COURTS
& COUNTY COURT AT LAW
AT 3:56 P M.
AUG 28 2001
BY DEPUTY
CARLOS E. TAMEZ

ANGEL SANTIAGO,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	**WEBB COUNTY**
vs.	§	**111TH JUDICIAL DISTRICT**
ALFONSO HOLGUIN, et al.	§	
Defendants.	§	

ORDER DENYING SUMMARY JUDGMENT

On this 17th day of August, 2001, came to be heard the Motion for Summary Judgment filed by Defendants K-Six Television, Inc., Devin Helmes, Amanda Salinas, David Cortez, Ana E. Garcia, and Juan Zamora. The Court, having considered the Motion, the Response, the summary judgment evidence, and the argument of counsel, is of the opinion that the Motion is without merit and should be, and is hereby, DENIED.

IT IS, THEREFORE ORDERED, ADJUDGED, AND DECREED, that Defendants K-Six Television, Inc., Devin Helmes, Amanda Salinas, David Cortez, Ana E. Garcia, and Juan Zamora Motion for Summary Judgment is DENIED;

Judge Presiding

SIGNED this 28th day of August, 2001.

A True Copy of the original, I certify,
the 6th day of Mar, 20 02
MANUEL GUTIERREZ
Clerk of the Dist. Courts and
County Court at Law, Webb County Texas
By: Esther DeGollado Deputy
ESTHER DEGOLLADO

CAUSE NO. 2000CVQ-001052-D2

ANGEL SANTIAGO,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	**OF WEBB COUNTY TEXAS**
vs.	§	**111TH JUDICIAL DISTRICT**
ALFONSO HOLGUIN, et al.	§	
Defendants.	§	

ORDER DENYING "NO EVIDENCE" SUMMARY JUDGMENT

On this 17th day of August, 2001, came to be heard the "No-Evidence" Motion for Summary Judgment filed by Defendants K-Six Television, Inc., Devin Helmes, Amanda Salinas, David Cortez, Ana E. Garcia, and Juan Zamora. The Court, having considered the Motion, the Response, the summary judgment evidence, and the argument of counsel, is of the opinion that the Motion is without merit and should be, and is hereby, DENIED.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that Defendants K-Six Television, Inc., Devin Helmes, Amanda Salinas, David Cortez, Ana E. Garcia, and Juan Zamora "No-Evidence" Motion for Summary Judgment is DENIED;

Judge Presiding

SIGNED this 28th day of August, 2001.

FILED
WEBB COUNTY, TEXAS
AUG 29 2001
AT
MANUEL GUTIERREZ
CLERK OF THE DIST. COURTS
& COUNTY COURT AT LAW

A True Copy of the original, I certify,
the 1st day of Mar, 20 02.
MANUEL GUTIERREZ
Clerk of the Dist. Courts and
County Court at Law, Webb County, Texas
By: Esther Degollado Deputy
ESTHER DEGOLLADO

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. 2000CVQ001052-D2

ANGEL SANTIAGO, JR., PLAINTIFF,	)	IN THE DISTRICT COURT
VS.	)	WEBB COUNTY, TEXAS
ALFONSO HOLGUIN: JUAN RAMIREZ; PAUL RAMOND BUITRON, III; DEVIN HELMES, INDIVIDUALLY, AND AS AGENT OF KVTV CHANNEL 13 LAREDO, OWNED BY K-SIX TELEVISION, INC.; AMANDA SALINAS, INDIVIDUALLY, AND AS AGENT FOR KVTV-CHANNEL 13 LAREDO, OWNED BY K-SIX TELEVISION, INC.; ANAHI G. GARCIA, INDIVIDUALLY, AND AS NEWS DIRECTOR OF KVTV-CHANNEL 13 LAREDO, OWNED BY K-SIX TELEVISION, INC.; JUAN ZAMORA, INDIVIDUALLY, AND AS STATION MANAGER OF KVTV CHANNEL 13 LAREDO, OWNED BY K-SIX TELEVISION, INC.; DAVID R. CORTEZ, INDIVIDUALLY, AND AS AGENT FOR KVTV CHANNEL 13 LAREDO, OWNED BY K-SIX TELEVISION, INC.; K-SIX TELEVISION, INC., A TEXAS CORPORATION, DEFENDANTS	)	111TH JUDICIAL DISTRICT

MOTIONS FOR SUMMARY JUDGMENT

On the 17th day of August, 2001, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Raul Vasquez, Judge Presiding, held in Laredo, Webb County, Texas.

Proceedings reported by computerized stenotype machine.

APPEARANCES

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The following proceedings were had in open court, with all respective counsel being present, and all respective parties being present before the Court, to wit:

THE COURT: In the matter of Angel Santiago v. Alfonso Holguin, 2000CVQ01052.

Counsel, approach the Bench, please, quickly. I don't think I'm going to have time to do it yet, until I get the jury back into the deliberations, so - I just want to talk to you-all a little bit about this motion. And I want to know who's here, also, on this case.

MR. SCHIWETZ: Steve Schiwetz and Bill Maxwell are here on behalf of the media defendants, and it's our motion. We're the movants.

MR. FAHEY: Good morning, Your Honor. Ed Fahey on behalf of the Plaintiff, Angel Santiago.

THE COURT: All right.

MR. MARTINEZ: Sergio Martinez, Your Honor, representing the Defendant Alfonso Holguin and Juan Ramirez.

THE COURT: But you don't have anything pending in this motion.

MR. MARTINEZ: I don't think we're in it. I don't know if Mr. Sandoval is, Your Honor. I don't think he's got any interest in this.

THE COURT: This is strictly a motion for partial summary judgment by the media defendants against the plaintiffs, so, you know--

MR. MARTINEZ: Yes, sir. We're out. We don't have any evidence or anything to argue.

THE COURT: All right.. That's fine. We'll argue your motion for summary judgment as soon as I get the jury back into deliberation form.

*****

THE COURT: All right. Mr. Fahey and Mr. Schiwetz and Mr. Maxwell, on the matter of *Angel Santiago v. Alfonso Holguin, et al.* Your motion.

MR. MAXWELL: Yes, Your Honor. May I proceed?

THE COURT: Yes, sir. And let me just get the file up here. All right.

MR. MAXWELL: Your Honor, as you're aware, this is a defamation case involving a media defendant. I'd like to give you a little bit of background, for refresher purposes, as far as who the defendants are.

The movants, today, are K-Six Television, Inc., a corporation that operates KVTV Channel 13.

THE COURT: Mr. Maxwell, let me assure you that I'm ready for your motion, sir. And so let me dispense with the facts, and let's get on to the law and let's get this done.

MR. MAXWELL: Very good. Essentially, Your Honor, the way that I see this case, it boils down to whether or not there is evidence, in the record of an omission of a material fact, or just disposition of facts that led to a false impression being laid in this broadcast. Or, if there is not, whether this was an accurate and, in that sense, if there was an omission of material facts, it might fall under the Supreme Court's holding in the *Turner* case, which is a recent case.

We contend that there is no evidence of such an omission or such an arrangement of facts to leave a false impression with the viewer. What we contend is this was an accurate, substantially true account of allegations that were made against the Plaintiff as a former president of a local nonprofit organization.

In that sense, we feel that this case falls squarely within the holding of the ***KTRK v. Felder case,*** which is a Houston Court of Appeals decision in

1997, which states that when a media defendant is reporting on allegations made against a public figure or private figure, public official, as long as -- and reports that there are allegations being made and allegations are under investigation, as long as the allegations, themselves, were made, and as long as the allegations are under investigation, the broadcast is substantially true.

THE COURT: When you say they were under investigation, investigation by whom?

MR. MAXWELL: By the three coaches. The three coaches who were -- one of them --

THE COURT: So you're telling me that if somebody calls you and says, You know what? I thank Judge Vasquez is taking money and, you know, there's no way that this thing should have happened, and you're going to run the story without verifying whether I'm taking money or not?

MR. MAXWELL: Well, Your Honor, what our reporter had was, initially, he was --

THE COURT: Three people called him, or three coaches told him that this gentleman was taking -- was supposedly misappropriating money.

MR MAXWELL: Correct. And they were -- I'm sorry.

THE COURT: And, so, he starts the story on the basis of these particular allegations Am I correct?

MR. MAXWELL: Well, there was a prior source that had approached Mr. Cortez, the assignments editor for KVTV. And Mr. Cortez had dealt with this source in the past, and he was the one that initially informed him.

THE COURT: That's correct. Mr. Geisler. I'm familiar with him.

MR. MAXWELL: Correct. So this was what Mr. Cortez considered to

be a reliable source. He sent Mr. Helmes out to interview these three coaches.

I think the evidence shows that, I believe, Mr. Holguin was a coach at this club for 13 years, had been very involved in the affairs. And they were making allegations against the former president of the club; allegations that. essentially, revolved around the fact that there were expense reports totaling over $15,000, when they understood that club was closed for most of the period of the year.

THE COURT: Well, I guess my question was directly in relation to your idea of "investigation," because you have three people that were part of this particular club that made these allegations, pursuant to your source, or whatever, but what investigation was going? I mean, they were questioning; if I can remember their statements, they were questioning where these funds were. But what investigation was being done, is my question to you.

MR MAXWELL: Well, they informed our reporter that they had notified the IRS.

THE COURT: That's not an investigatory type of complaint.

MR. MAXWELL: Well, the coaches, themselves, were in the process of investigating. They had gathered documents. They were attempting to determine what happened to these funds. And that was what the station was reporting on. The station was reporting on allegations made by --

THE COURT: Okay. Well, I guess -- and I keep on going back to my own idea of what you're doing, okay, because -- by the way, I was a journalist major, and so I know a little bit about the factual basis for writing stories, but that's neither here nor there.

The question to you is, all right, so three people are, all of a sudden, doing something in regards to the court system and they find out that there is something missing from the courthouse and they, for whatever reasons, think it's me. And they go out and tell you-all that they're investigating. Do you think that, just on that basis, you're going to go out and put it on the news that Judge Vasquez is, perhaps, stealing something, or misappropriating something, because three people are looking into it?

MR. MAXWELL: Well, Your Honor, respectfully, as long as it is reported as allegations are being made about a public official, a private official, what have you -- I mean, the *Felder* case sets it out very clearly. You know, quoting it, it says, *If the law were otherwise, the media would be subject to potential liability every time that they reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure.*

They would never be reported by the media for fear that they would, ultimately -- the allegations would, ultimately, be untrue and would subject media defendants to defamation and liability on every score.

THE COURT: Well, but you're going on the defensive issue of substantially true in regards to the story and regards to reporting., I mean, your affirmative defense of this issue, you know, perhaps, may come to being in the ultimate trial of the case, but why would I want to grant it, summarily?

MR. MAXWELL: Well, again, the issue, Your Honor, is we don't have a dispute about what the gist of these --

THE COURT: I grant you that. The story is in its full context and video, and there's no question about that. I think the question is whether or

not the substantial truth of it imputes any type of wrongdoing by Mr. Santiago without any basis for it, or with malice in some form. I guess, in this case, we don't really need malice. I don't agree with you that he's a limited public figure. I'll tell you that now. But, you know, in any case, let's go on to your argument.

MR MAXWELL: Well, and just for the purposes of the record, I want to make sure -- we have a traditional motion for summary judgment before the court --

THE COURT: And a no-evidence motion.

MR MAXWELL: --as well as a no-evidence. And we have challenged that -- in our no-evidence motion, we have challenged that element of the Plaintiff's burden of proof, which is the burden of proving falsity of statements --

THE COURT: And we'll go through them --

MR. MAXWELL: -- or falsity of the broadcast.

THE COURT: All right.

MR. MAXWELL: But, again, it is our contention and the station's contention that the *Felder* case is very close to these facts. The *Felder* case involved a TV news reporter reporting on allegation that a school teacher had been verbally abusing and intimidating students.

The reporter goes out and interviews the parents and they say, Yes, you know, these are our complaints against this teacher; tried to get interviews with the -- with the teacher herself and could not; tried to get interviews and spoke briefly with the principal who said, Yes, in fact, these allegations are under investigation,. We're looking into this matter. They go back and they air the story that day. And, again, the court held that, you know, as

long as we're talking about allegations of wrongdoing.

The station was not accusing Mr. Santiago of anything. They were reporting on allegations made by fairly high-ranking officials within this local nonprofit organization, and reporting this matter of general interest; that there were questions being raised about his management and accounting for the club's finances, and they were reported as such. They were reported as allegations and reported as fact that these coaches were looking into these questions. And that's all it was.

THE COURT: All right. Mr. Schiwetz.

MR. SCHIWETZ: The only thing I would add to that, Your Honor, is that you used the analogy of what if somebody comes up and says, *The court is mismanaging funds,* something like that. The analogy appropriate in this case, I think, would be what if it's people who are associated and work with this court, regularly? That's the distinction here.

The people that were reporting their allegation on would be like if your clerk and your bailiff were the ones that were doing the reporting. These were people that were intimately tied up with the boxing club. You know, *We're looking into this. We think something is amiss here. We talked to the IRS about it. We talked to United Way, or trying to talk to the United Way,* or things like that.

And that's where -- I think the analogy is a good one, but the appropriate comparison is with people who are real close to the person who's being accused. It's not just, you know, some citizens group, or something like that, that can walk in off the street saying, *Hey, there's money missing, and we think he did it.*

THE COURT: All right, sir. Mr. Fahey.

MR. FAHEY: Your Honor, for the K-Six Television to succeed on this motion for summary judgment, they must prove every element of the affirmative defense of substantial truth. In their motion, they have excerpted piecemeal portions of the broadcast and allege that each little piecemeal portion is a true, literally true or substantially true statement. That method has been frowned upon by the Supreme Court of Texas in the case of *KTRK vs. Turner.*

That case said you have to look at the entire broadcast as a whole and you have to look at the embedded meaning, and they must prove the substantial truth of the embedded meaning in the broadcast.

So if they're saying, *We're KVTV and here's a coach and he's saying that Santiago stole money,* well, the embedded meaning there and the part that's false is that Santiago stole money. And that is the impression that the viewers, who are people of reasonable and normal intelligence, are going to be left with.

That is their burden today, to prove the substantial truth, none of what Helmes said, but they have to prove the substantial truth that Santiago stole $15,000. They have not even alleged that today, much less, taken one step in the direction of proving that.

THE COURT: All right.

MR. FAHEY: The other question that they brought up about the case of the other KTRK -- well, I don't know what it was, but the one in Houston, is that allegations -- they were just reporting allegations. The question is, allegations by whom, and by what virtue do these three coaches have any investigatory power, whatsoever?

Is it a police investigation? Is it a governmental investigation? I would

not try to use the precedent off of that case. I would rely on *Turner* to say that this whole broadcast has to be viewed as one big whole, and the embedded meaning is that he's a thief yet.

THE COURT: All right, sir. In regards to the no-evidence summary judgment that they have filed, sir, what is your response to that?

MR. FAHEY: The no-evidence motion claims that there is no evidence to show any of our alleged elements of our pleading. One of -- the first element to plead in the defamation claim is that there was a false statement made about the Plaintiff. We are alleging that the impression that he's a thief is a false statement.

Now , they say there's no evidence of that. I presented to he court a taped video of the broadcast which was received from KTV Television in a request for production. And I think anyone who views that video will see that there is more than a scintilla of evidence that a reasonable intelligent person could leave with the impression that, *Hey, this guy really did it.*

So that is my attempt to defeat their no-evidence motion, because there is a scintilla of evidence and it is inside that video.

MR. MAXWELL: Well, Your Honor, he has accurately portrayed what he contends to be the implication of this broadcast, but he has not proven it to be false. I mean, I -- you know, I don't know whether Mr. Santiago is a thief or not, but there is no evidence before the court where he has denied doing it. There's not an affidavit. I haven't been favored with a cite to the record where he denies any of the allegations that were specifically made against him in the pleadings.

MR. FAHEY: That's not our burden here today. The burden is on the movant.

THE COURT: I'll allow your response when I tell you, sir.

MR. MAXWELL: Respectfully, Your Honor, in a no-evidence context, a no-evidence motion for summary judgment, we have pointed out to the nonmovant the element of which there is no evidence in the record on which he will bear the burden of proof at trial.

He will bear the burden of proof in proving that false defamatory statements were made about him at trial. He has to come forward with more than a scintilla of evidence that false statements were made about him.

And, now, I agree, in a traditional sense, in the traditional motion for summary judgment, which we're also here on, it is our burden to negate the falsity by showing that the statements were substantially true, which we feel we have done. But as far as the no-evidence goes, it's his burden to come forward with evidence sufficient to take the case to a jury on the particular elements of his defamation claim.

THE COURT: All right. Anything else, Mr. Schiwetz?

MR SCHIWETZ: I do think it's interesting that he's sitting there, as part of his argument both in his brief and his response, and in his argument here, saying, They haven't even alleged that he's a thief. I mean, that's kind of the point.

THE COURT: Well, he hasn't denied he's a thief either.

MR. SCHIWETZ: Well, that's true, too. You know, I thought it was kind of curious that he's saying that our story is saying that he's a thief, or our story is saying is that some people are alleging that there's something peculiar going on over there, and then he complain because we haven't specifically alleged that he's a thief. That's right. We haven't.

THE COURT: All right. Guys I will tell you that I have a real hard time with your motion for summary judgment and your no-evidence summary judgment. I really -- your motion for summary judgment is denied. Your no-evidence motion for summary judgment, I've got problems because of what you've done in regards to the response. Once a no-evidence motion for summary judgment is filed and is shown to you, you have to come - - the burden shifts to you, sir, and you've only given me the videotape. Quite frankly, I haven't seen it. I actually just read a transcript of it.

So what I'm going to do is go look at it and look at the voice inflection and all that kind of stuff from the videotape. It sounds like you-all are -- the story is implying, rather, not you-all, but the story is implying that Mr. Santiago is a thief, in some form or another, and it leaves little to be desired. An I thought the reporter should have gone beyond the idea of just talking to someone that is making allegations, and then calling the responding party and not getting any comment, but not investigating any further.

You know, unfortunately for you-all, I know this boxing club. I'm not involved with it, Two judges are involved with it. I have never had to worry about that, so I'm glad that I'm not in it. But, you know, it was easily verifiable stuff that could have been, you know, information gotten.

As far as reporting is concerned, I think the most important thing to do is to verify your source and verify your story. And the fact that you may have had some information is kind of an unusual twist. I'm going to read your case again regarding that teacher and see how I fit it, but, quite frankly, at this point in time, I am not looking at granting your motion for summary judgment.

MR. SCHIWETZ: One matter, Your Honor.

THE COURT: Yes, sir.

MR. SCHIWETZ: When we appeared before you before on the motion for continuance on this matter regarding the trial, we pointed out to the court that we're set for trial in September and that, depending on what the court's rulings were on this, either side was likely to conduct an interlocutory appeal. I wanted to remind the court of that, that the court said at that time that we would not be bound to that September trial date. We would be allowed time to --

THE COURT: September 10th?

MR. SCHIWETZ: I think that's right.

THE COURT: Well, don't worry. I'm not going to be here on the 10th, so I don't think you would have to worry about that trial date.

All right. Well, let's talk about that, then. When do you want to do this trial, assuming that you go through all the particulars?

MR. MAXWELL: I would suspect -- I don't know what the docket is like on the Fourth Court, but I would suspect we're looking at 10, 12 months.

THE COURT: Oh, no. They don't take that long anymore. Not for these type of things. Not on interlocutory stuff. They dish it out pretty good. But you got to make sure you file it.

All right. Well, I'll do this. Let me leave the September docket on for pretrial. Let me see what I'm going to do with you-all on pretrial. Maybe I can make you work enough to where we can start talking about settling this case, and see if we can get some of these defendants in or out and find out who's going to wind up.

Your main cause of action, I will tell you, is against the other defendants. This is still questionable. The fact that I may not have granted summary judgment today on -- doesn't mean that, on the trial, I would not grant an instructed or directed verdict, you know. I'll caution you as to that. I mean, I'm going to go back and read a couple of these cases again, but, you know, you really should have responded more affirmatively on the no evidence motion for summary judgment.

Anything else?

MR. MAXWELL: No, Your Honor.

THE COURT: All right. We'll see you here on pretrial, September 6th, I think. Is that correct?

MR. FAHEY: Are the motions denied?

THE COURT: The motion for summary judgment is denied sir. The motion for no-evidence summary judgment I'm taking under advisement. anything else?

MR. FAHEY: That' all, Your Honor. May we be excused?

MR. MAXWELL: Your Honor, will we have a ruling, do you think, by the time of the pretrial conference?

THE COURT: Yes, sir. For sure. Yeah. What I need to use -- did you submit an order on the motion for summary judgment?

MR. MAXWELL: We did.

THE COURT: I'll sign that one.

MR. MAXWELL: Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. SCHIWETZ: May we be excused?

THE COURT: Yes, sir.

*****

STATE OF TEXAS

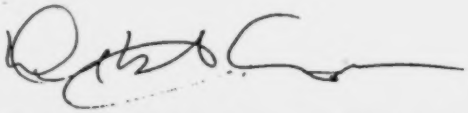
COUNTY OF WEBB

I, Debra Alvarado Cameron, Official Court Reporter in and for the 111th District Court of Webb, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $94.00 and was paid/will be paid by Mr. Edward P. Fahey, Jr.

WITNESS MY OFFICIAL HAND this the 8th day of April, 2002.



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G

No. 04-01-00592-CV

K-SIX TELEVISION, INC., et al.,

Appellants,

v.

Angel **SANTIAGO,**

Appellee.

APPELLEE'S MOTION FOR REHEARING

Appellee, Angel Santiago, submits this motion for rehearing in response to the opinion issued by the Court on February 13, 2002, and requests that the Court consider the following points:

Point 1: The Court of Appeals erred in not considering Helmes' handwritten notes.

Point 2: The Court of Appeal erred in assessing costs against the appellee.

Argument and Authorities

Point 1. Helmes' Handwritten Notes Must Be Considered By The Court

This Court has held that it may not consider Devin Helmes' notes because they were not on file with the trial court, and not part of the record. However, this Court is to consider the notes, because they are competent summary judgment evidence and part of the summary judgment record. This conclusion is dictated by the Texas Supreme Court holding in *Morgan v. Anthony,* 27 S.W.3d 928, 929 (Tex. 2000). Morgan sued Anthony for intentional infliction of emotional distress. *Id.* at 928. The trial court

granted Anthony's motion for summary judgment on the basis that there was no evidence he acted intentionally. *Id.* at 929. The Appeals Court for the Ninth District affirmed. *Id.* In finding legally sufficient evidence to raise a fact issue about the disputed element of Morgan's claim, the Supreme Court considered answers to Morgan's own interrogatory, in conjunction with excerpts from her deposition. *Id.* The interrogatory had been challenged as not being competent summary judgment proof. *Id.* However, the Court noted, "Morgan was questioned in one of her depositions about her seven-page interrogatory answer that described in detail the events that are the basis for this suit, and the interrogatory answer was attached to her deposition as an exhibit." *Id.* The Court held that the excerpts of Morgan's deposition relating to the interrogatory, and the interrogatory itself, were "part of the ummary judgment record.," *Id.* The Morgan Court's reasoning was based on three elements: 1) "The interrogatory answer became competent summary judgment evidence when it became a deposition exhibit;" 2) "Morgan affirmed in her deposition that it was correct;" and 3) "she was subject to cross-examination about the assertions in her interrogatory answer." *Id.* In Santiago's case, if you substitute the words, "Helmes' handwritten notes" for the word "interrogatory," in Morgan, you have the same set of facts.

Helmes' handwritten notes were obtained pursuant to Plaintiff's First Request for Production, served on defendants on December 11, 2000. However, the notes were not actually produced by K-Six Television, until March 9, 2001, the day of Helmes' deposition, and 60 days after they were

due. *Depo Devin Helmes* 27 :10 to 28:17. At the deposition, Helmes confirmed that the notes were correct. *Depo Devin Helmes* 28:7 to 28:11. And, exactly as in Morgan, Helmes was cross-examined about the content of his notes----for 43 consecutive pages of his deposition testimony. *Depo Devin Helmes* 27:10 to 70:16. At the end of the deposition, Helmes' handwritten notes, like the interrogatory in Morgan, were attached to the deposition as an exhibit. *See Appendix "A"* Helmes swore the contents of his deposition were true and correct on July 3, 2001; *See Appendix "B."* The court reporter's certifications are attached in *Appendix "C."* Thee facts square perfectly with Morgan; therefore, this Court must consider the notes of Helmes as "competent summary judgment evidence." *Morgan,* 27 SW.3d at 929.

The evidence, once considered by this Court under a *de novo* review, *American Broadcasting Companies v. Gill,* 6 S.W.3d 19, 27 (Tex. App.—San Antonio 1999 pet, denied), *overruled in part on other grounds, Turner v. KTRK Television, Inc.* 38 S.W.3d 103 (Tex. 2000), requires affirmation of the trial court's judgment. It is dispositive of K-Six' appeal. It dictates a remand for trial on the merits.

Whether Helmes' notes were considered by the trial court in ruling on summary judgment is irrelevant to this appeal, because "[t]he appellate presumption is that the omitted summary judgment evidence supports the trial court's judgement." *Cantu v. Western Fire and Casualty Inc. Co.,* 723 S.W.2d 668 (Tex. 1987); *DeSantis v. Wackenhut Corp.,* 793 S.W. 2d 670, 689 (Tex. 1990).

Reviewed in the light most favorable to Santiago, the notes reveal that:

the Treasurer of the LABC believes Angel Santiago is an honest man. *See Appellee's Brief,* Section B.5. This evidence raises a fact issue as to the truth of falsity of the statements made in K-Six' broadcasts. You cannot be an honest man and steal $15,000 at the same time.

This evidence, when viewed in the light most favorable to Santiago, reveals that: Helmes knew, before the broadcast, that a knowledgeable, un--biased, and reliable informant believed Santiago to be an honest man. Helmes' fault lies in what he did with the information. He ignored it. He didn't publish it. He didn't try to find out more about why the Treasurer of LABC considered Santiago an honest man. According to the authorities cited in *Appellee's Brief,* Section B.5.(a), *supra,* Helmes actions, (or in-actions) constitute "actual malice." Alternatively, Helmes' actions show he was negligent about discovering the truth. With this understanding, and with every inference indulged in favor of Santiago, a fact issue has been raised about the element of "fault."

There are three other elements of Santiago's cause of action. And there is sufficient evidence, in the record, on each remaining element, to send his case back to the trial court. One, "the defendant published a statement,." *WFAA v. McLemore,* 978 S.W.2d 568, 571 (Tex. 1998). This fact is un-controverted, and evidenced by the videotape of the broadcast and the transcript of the broadcast. Two, "the statement concerned the plaintiff." *Id.* The broadcast referred to Angel Santiago by name. Evidence for this is found in the transcript of the broadcast. Element two is also uncontroverted. Three, "the statement was defamatory to the plaintiff." *Id.*

The statements made in the broadcast, "when viewed as a whole," *Turner v KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000), are defamatory on their face. That is because they falsely charge Santiago with a crime. Such statements are libel *per se*. *Christy v. Stauffer Pub'g*, 437 S.W.2d 814, 815 (Tex. 1969). Alternatively. Santiago asks this Court to determine that "the statements are reasonably capable of a defamatory meaning." *Musser v. Smith Protective Servs.*, 723 S.W.2d 653, 654 & n.1 (Tex. 1987); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

In sum, there is "some evidence" in the record for each element of Santiago's claim against K-Six. The newly considered evidence as to "fault" and "falsity" is material because it relates to the substantive law, i.e. the elements of defamation. *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, no writ). It is "more than a scintilla," because reasonable persons could differ in their conclusions as to whether Santiago is an honest man or a thief. *Id.* And it is genuine because a reasonable jury, if given the evidence, could find that they believe the Treasurer, instead of the defamers. *Id.*

Summary judgment, under TRCP 166a or 166a(i), is therefore improper in this case.

Point 2. The Court Erred in Assessing Costs Against Santiago.

Section 51.015 of the Texas Civil Practice and Remedies Code provides:

> In the case of an appeal brought pursuant to Section 51.014(6), if the order appealed from is affirmed, the court of appeals shall order the appellant to pay all costs and reasonable attorney fees of the appeal; otherwise,

> each party shall be liable for and taxed its own costs of the appeal.

By the Court's judgment, dated February 13, 2002, the order appealed from was reversed. Therefore, the relevant part of the statute begins with the word, "otherwise." And each party is liable for their own costs. Santiago therefore cannot be liable for K-Six' costs, as was erroneously recited in the judgment.

For the reasons stated in this brief, appellee asks the Court to grant this motion for rehearing, withdrawn its opinion, affirm the trial court's judgment, and remand the case for a trial on the merits.

Respectively submitted,

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ATTORNEY FOR APPELLEE,
ANGEL SANTIAGO

CERTIFICATE OF SERVICE

I certify that on February 18, 2002, I faxed a copy of Appellee's Motion for Rehearing to William E. Maxwell, counsel of record for K-Six Television, Inc. et al., and whose address a fax number are shown below.

Edward P. Fahey, Jr.

William E. Maxwell
The Rangel Law Firm, P.C.
615 Upper N. Broadway
Suite 2020
Corpus Christi, Texas 78477
Fax: (361) 883-2611
Tel: (361) 883-8500

CERTIFICATE OF CONFERENCE

I certify that on February 18, 2002, I have conferred with William E. Maxwell, of The Rangel Law Firm, P.C., and have attempted in good faith to reach an agreement about Appellee's Motion for Rehearing. We have been unable to reach an agreement, because Mr. Maxwell would oppose it.

Edward P. Fahey, Jr.

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

CORRECTED JUDGMENT

NO. 04-01-00592-CV

K-SIX TELEVISION, INC., et al.,
Appellants

v.

Angel **SANTIAGO,**
Appellee

From the 111th Judicial District Court, Webb County, Texas
Trial Court No. 2000CVQ-001052-D2
Honorable Raul Vasquez, Judge Presiding

BEFORE CHIEF JUSTICE HARDBERGER, JUSTICE LOPEZ,
AND JUSTICE GREEN

This court's judgment of February 13, 2002, is withdrawn. In accordance with this court's opinion of February 13, 2002, the trial court's orders are REVERSED, and judgment is RENDERED that appellee, Angel Santiago, take nothing with regard to his claims against appellants. It is ORDERED that costs of the appeal are taxed against the parties who have incurred them. *See* Tex. Fam. Code Ann. § 51.015 (Vernon 1997).

SIGNED March 1, 2002.

Alma L. Lopez, Justice

TRANSCRIPTION OF AUDIO TAPE

LABELED:

73rd LEG SENATE STATE AFFAIRS COMMITTEE

SB 76

2-17-93 9:00 A.M.

TAPE 1 OF 1

MALE VOICE: The State Affairs Committee will come to order. The Clerk will call the roll.

FEMALE VOICE: Senator Harris.

MALE VOICE: Here.

FEMALE VOICE: Senator Rossen.

FEMALE VOICE: Here

FEMALE VOICE: Senator Carricker (phonetical spelling).

(No response audible.)

FEMALE VOICE: Senator Henderson.

(No response audible.)

FEMALE VOICE: Senator Leedham.

MALE VOICE: Here.

FEMALE VOICE: Senator Lucio.

MALE VOICE: Here.

FEMALE VOICE: Senator Luna.

MALE VOICE: I can say Aye.

FEMALE VOICE: Senator Nelson.

FEMALE VOICE: Here.

FEMALE VOICE: Senator Patterson.

MALE VOICE: Yes. Here.

FEMALE VOICE: Senator Shelley.

(No response audible.)

FEMALE VOICE: Senator Sibley.

MALE VOICE: Here.

FEMALE VOICE: Senator West.

(No response audible.)

FEMALE VOICE: Senator Whitmeyer.

MALE VOICE: Here.

THE CHAIR: A quorum is present. The Chair will lay out -- will deviate from the order just briefly. The Chair will lay out Senate Bill 178 and recognize Senator Parker.

SENATOR PARKER: Mr. Chairman, in 1979, we - we authorized the --

MALE VOICE: Here.

SENATOR PARKER: -- the investigators for the State Board of Pharmacy and - and later a Racing Commission to be Certified Peace Officers. Because the retirement legislation for Certified Peace Officers was also passed in 1979, these are the only categories of peace officers that work for the State that aren't eligible to participate in the retirement benefits for Certified Peace Officers. And this simply cleans that up and allows them to be in the program. I have no witnesses. There is no occurrence filed in behalf or against the Bill.

THE CHAIR: Anybody have any questions of Senator Parker?

SENATOR LEEDHAM: Mr. Chairman, just one.

THE CHAIR: Senator Leedham.

SENATOR LEEDHAM: Senator Parker, I notice in - I'm sure you have a concern not now but eventually possibly that the lee course of, is really,

has no secure adequate funding. It - It comes from a portion of the -

_____: One of them.

SENATOR LEEDHAM: - - packs that comes in and isn't really related to the beneficiary. So, although it's well funded now, eventually it'd be desirable to these folks and yourself and all will realize that it needs to begin to get a reliable source of funding depending upon the participates, or you're half-way where I'm talking, because it - this -

_____: As soon as we pass your income tax, so it's gonna - we're gonna _____ one for it.

_____ (laughter)

SENATOR LEEDHAM: You have to relate to funny even then to the individual paying it in, but the degree to which - - in the long run as we hire these people more for it, I think you need to be aware that sooner or later that the funding source has to be defined by the participants rather than just - -

SENATOR PARKER: I'm just trying to fix one problem at a time, Senator Leedham.

SENATOR LEEDHAM: I understand.

THE CHAIR: Any other questions for Senator Parker?

SENATOR PARKER: That's our problem.

THE CHAIR: If not, Senator Lucio more that Senate Bill 178 be reported back to the Senate with the recommendation to be passed and be _____. Clerk, call the roll.

CLERK: Senator Harris.

SENATOR HARRIS: Aye.

CLERK: Senator Ost (phonetical spelling).

SENATOR _____: Uh.

CLERK: Senator Carricker (phonetical spelling).

SENATOR CARRICKER: Aye.

CLERK: Senator Henderson.

SENATOR HENDERSON: _____ (not understandable)

_____: You sure we'll - -

CLERK: Senator Leedham.

SENATOR LEEDHAM: Aye.

_____: - - re-elect him, though?

CLERK: Senator Lucio.

SENATOR LUCIO: Aye. (Laughing) I'm just kidding.

CLERK: Senator Luna.

(No audible response.)

CLERK: Senator Nelson.

SENATOR NELSON: Aye.

CLERK: Senator Patterson.

SENATOR PATTERSON: Aye.

CLERK: Senator Shelly.

(No audible response.)

CLERK: Senator Sibley.

SENATOR SIBLEY: Aye.

CLERK: Senator West.

(No audible response.)

THE CHAIR: Aren't they eight AYEs and Nos. The Bill will be reported in favor.

SENATOR PARKER: I thank you all for completing my Law Enforcement Program for the session.

[LOUD LAUGHTER]

_____: Really.

THE CHAIR: Now, the Chair's gonna lay out Senate Bill 76 and recognize Senator Turner.

SENATOR TURNER: Thank you, Mr. Chairman. Senate Bill 76 is a Bill that allows an interlocutory appeal in a case involving suit of libel or slander against the media. It's designed really not to change the substantive law in any way but simply designed to hold down the cost of litigation which I think we all are concerned about these days.

Under - Under current law, you can have an Interlocutory appeal. That is, appeal before the final trial in five different situations which I won't go into. But all this bill's gonna do is add a sixth circumstance under which you can have an interlocutory appeal.

A lot of times in these cases involving freedom of the press, you find that there are often times when the case has to go through the full trial, it - - sometimes plaintiff will prevail but gets on appeal turns out that the upper courts, higher courts will rule that no, that freedom of press protected the media and reversed the judgment.

There's not a lot of cases on these kinds of issues, but there are enough to make it troublesome to have to go through the full cost of an appeal just to show when you get to the higher court that freedom of press protected the media.

So this is gonna allow an appeal from an adverse ruling on a summary judgment at the trial court level, allow a direct appeal to the Court of Appeals, thus saving the parties the expense of going through a full trial only to find out later that the District Judge should have granted the Motion

for Summary Judgment.

As I say, this Bill doesn't change the substantive law in this area in any way, but it certainly cuts down the procedural delays and allows the parties to get the matter settled without spending an undue amount on attorneys' fees.

We have four witnesses who are here and available to testify and several who signed up in favor of the Bill. Those who signed up in favor of the Bill may want to testify.

Lyndol Williams who is Executive Vice President of Texas Press Association if here. Ann Arnold with the Texas Association of Broadcasters. Joe Jerkins who is the past President of Texas Association of Broadcasters, and Barbra Tante who is Director of Services with the Texas Daily Newspaper Association. Have all signed up in favor of the Bill.

We have here today to - to offer testimony Mr. Robert Deckert, who is Chairman of the Board and Chief Executive Order - Officer of the Belo Corporation, which as you know owns the Dallas Morning News ad WFAA Television among others.

We have Ken Long, who is up here from my District and Long Round Rock, who is the publisher of the Round Rock Leader, who will offer some brief testimony.

And by way of resource witnesses, if you have any question, we have Dean Udhoff from the UT Law School and Kirte Kenser, who is a First Amendment lawyer and practices extensively in that area.

I have two Committee Amendments that I'm gonna lay out before you that Senator Rosson has agreed to offer for me. Actually, I - Actually I understand that they're all - - it's all combined with one Amendment.

_____: Senator Turner, we have two different here.

_____: Yes.

SENATOR TURNER: Okay.

_____: And if I - if - if you can reasonably put - -

(FEMALE VOICE) _____: Six hundred one . . .

SENATOR TURNER: If you wanted to have - -

_____: (not understandable)

SENATOR TURNER: - - both items on it - -

(MALE VOICE) _____: That'd be just one Amendment -

SENATOR TURNER: Okay.

(MALE VOICE) _____: For floor debate - -

SENATOR TURNER: All right.

(MALE VOICE) _____: - - would make it two.

SENATOR TURNER: All right. We'll - - I understand we have both those changes laid out in one Amendment. Basically what the Amendment is going to do is to clear up the language of the proposal to make it clear that this only applies to a claim or defense in a lawsuit against a member of the electronic or print media.

The earlier language wasn't quite as clear, quite as narrow. This language was worked out in negotiations between lawyers who represent plaintiffs and those who represent defendants, and the second addition that's on the same Amendment that Senator Rosson will offer simply states that in the case of an appeal brought under this provision, that each party will be liable and taxed for its own cost of appeal.

Thus, whichever party wants to - wants to appeal summary judgment, then they both - either of them, of course, have to carry their own costs of

that on appeal.

Mr. Chairman, if you would, I'd like to have you recognize our first witness, Mr. Deckert.

SENATOR CARRICKER: Mr. Chairman, - -

THE CHAIR: Uh, yes. The last name?

SENATOR CARRICKER: - - could I ask Senator Turner a question before it - -

THE CHAIR: Surely.

SENATOR CARRICKER: Senator Turner, in this - This Amendment brings up a question that had already risen in my mind looking at the original Bill, and that is, why the claim arising only from broadcast or written publication, and then the Amendment clarifies the intent would only apply to the electronic or print media? Why shouldn't an interlocutory appeal not be available to someone who's not in the electronic or print media but who is defending a - a - or prosecuting a - a libel or a slander claim?

SENATOR TURNER: Well, what we ran into in the objections that were - were levied against the earlier language by plaintiffs' bar was that basically we had drafted language that in their judgment would have included a whole lot of things that we weren't really aiming at.

For example, you could say and argue that an insurance policy is a written publication, and we didn't see any reason to have anybody ever claim that because of some language an insurance policy ought to be able to have an interlocutory appeal but thought there was some libel slander involved.

If somebody writes a letter and sends it to somebody else, you could argue that that's a written publication, and this Bill clearly wouldn't entitle

to cover those kinds of situations. So, to - to vary - -

SENATOR CARRICKER: Well, I can understand that in the case of an insurance company - -

SENATOR TURNER: Right.

SENATOR CARRICKER: - - an insurance policy. What I can't understand is - is in the case of a letter that I write to you, for example, and - and you - - there may arise from that letter a claim of - a claim of libel. Uh, I'm not sure why the court procedure should be different for me as an individual as they are for *Dallas Morning News* or - -

SENATOR TURNER: I raised that same question, and Mr. Kinser, who is here as a resource witness who practices extensively in that area, I'd like for him to address that question, because I'll - I'll raise the very same question with him.

Uh,, obviously, we all know that the media, the printed media - print media - the electronic media, have a very special place, a very special area of protection on the Constitution, and obviously that's what we were trying to - to aim at here.

Any person or any person who is a member of - of that electronic or print media is covered and is allowed to have this interlocutory appeal, and - and by member under the new language we will offer, we - we intend to cover not only the corporations and the partnerships and other legal business entities that may be engaged in the print or electronic media, but reporters, any free lancers who might be working for, on a part-time basis, a newspaper or - or a radio station, television station, and I guess if you and I decide we're gonna set up a little newspaper in the basement of our house, you know, or in the garage, then we're gonna be covered and be able to have this protection.

The whole purpose of the amendment is to try to remove the chilling effect that would naturally exist against the exercise of the freedom of press that we all know that we all believe in, but to remove that chilling effect is brought about by the fact that when suits are brought against the media, it can result in protracted litigation that even though the media is certainly gonna be protected ultimately on appeal based on the Constitutional protection, they have to go through all this lengthy litigation to get there.

And, so that's really what this Bill is designed to do.

SENATOR CARRICKER: Okay.

SENATOR TURNER: But I - I would like Mr. Kinser to more specifically address your concern, because I also shared it and - -

SENATOR CARRICKER: That - - That'll be fine.

SENATOR TURNER: - - and receive some explanation I think will satisfy you.

THE CHAIR: Senator Lucio.

SENATOR LUCIO: Senator, somewhere along the line maybe one of the witnesses, if - if you don't have access to statistics - - statistics play a vital part on any - anything we take up, I'd like to know, you know, how many cases were filed in the last - last couple of years of the 1980's, the first two years in the 1990's. I'd like to know by category, if possible, who's been suing the media, the lawyers, doctors, has it been politicians, who out there has been suing, and the last one is I'd - I'd like to have a feel who in Texas is being sued, have been mostly the favors in Houston or Dallas or San Antonio or the Valley, where - -

SENATOR TURNER: All right. We - We have that information. I think I'll let Mr. Deckert or Mr. Kinser share it with you to give you the exact information -

_____: (Unintelligible)

SENATOR TURNER: I've - I've read it, and, you know, there's really not a lot of cases that are filed in this area. It's a very limited area of law practice and not a lot of litigation.

I had a call the other day from - from a newspaper man who I was telling about the Bill, and he got real excited about it, and he said, "You know, my - my professional liability insurance is so high," he said, "I can hardly afford it any more." He said, "Anything we can do to hold down the cost of litigation in this area is gonna help me."

And a lot of these little - little newspapers in small towns like I have in my District, you know, they're scared to death that they're gonna get sued and if they get sued and insurance coverage is not adequate, that they're gonna end up being put out of business by one lawsuit.

And so what we're trying to do here is ensure that when those kind of cases arise, we want to be sure that they're disposed of in the most efficient manner possible - -

SENATOR LUCIO: Quite frankly, I'm - I'm trying to help you with your Bill. I - I - I support your Bill, but - -

SENATOR TURNER: I know you do, and I appreciate that. [Two people talking at same time.]

SENATOR LUCIO: - - who's being sued and what - what is causing this.

SENATOR TURNER: I think that information would be helpful and Mr. Kinser has it, and I know Mr. Deckert also has it.

THE CHAIR: Senator Luna?

SENATOR LUNA: Usually the Judge is - or Judges hearing determine

who or assess the cost. Why are you assessing the cost by the Bill?

SENATOR TURNER: Senator Luna, frankly, that language that 's in that Amendment is - is a compromise between plaintiff's bar and defense bar. They've - They took the Position that plaintiff's bar did, that if they were going to go along and - and say that they would support this Bill to allow these interlocutory appeals in these type of cases, they wanted the party that's taking the appeal up to pay for the cost of it.

It's a little bit of a departure granted from usual practice of having a judge determine who pays the cost, but frankly it was just sort of part of the deal that was struck between the plaintiff's bar and the defense bar on this particular issue.

And I'll be honest with you. I'm not wedded to it, and I - I have in fact even expressed my interest and taken a look at it before we go to the floor because I thought it was a little bit odd for the plaintiff' bar and the defense bar to agree to it in light of the fact that as you have so clearly stated, normally the Judge makes that determination.

But that's what they agreed to, and so that's why we put it in the Amendment.

SENATOR LUNA: Okay.

THE CHAIR: Any further questions of Senator Turner? If not, then I'll call Robert Deckert.

MR DECKERT: Good morning, Mr. Chairman. And, Senator Turner thank you for taking the lead on this Bill and for introducing me to the Committee. I very much appreciate the chance to appear today before you not only on behalf of your own -

THE CHAIR: For the record, identify yourself and who you represent.

MR. DECKERT: For the record, I'm Robert Deckert, Chairman and Chief Executive Officer of A. H. Belo Corporation in Dallas.

And not only am I representing Belo today but I'm also speaking on behalf of an organization we have formed in the last several months to address this issue, the Appellate Fairness Coalition.

Its members include all of the industry associations who were named earlier and who have representatives present here today, including the Texas Association of Broadcasters, the Texas Press Association, Texas Daily Newspaper Association, and in addition, more than a dozen companies that are engaged in the business of publishing newspapers and operating television and radio stations of all sizes throughout Texas.

As a reference point for Belo, we not only publish a large newspaper and have some large television operations, but we also operate medium and smaller-size television stations in other states and last year went into a partnership in the cable business which puts us in some very small markets here in Texas.

Mr. Chairman, the members of the coalition who represent this breadth of interest in the business are greatly concerned that the Constitutional rights of the press have been seriously eroded in Texas by the costs and management time associated with libel litigation at the State level.

Statistics referring to the Senator's question a moment ago tell us that only twenty-five percent of libel jury verdicts since 1980 have survived appeal. Two-thirds were reversed altogether and another ten percent had the damages reduced on appeal. For the entire decade of the 1980's final libel awards to plaintiffs amounted to no more than thirteen percent of the initial verdicts.

The key point, of course, is that the Constitutional protections, the First Amendment protection must be brought to bear in order to assure a fair trial in libel litigation.

The Appellate Fairness Coalition is troubled by the fact that Texas newspapers and television and radio stations are not receiving the appropriate protection at the trial level.

In a series of decisions that I know many of you are familiar with going back to the mid-1960's, and starting with the decision entitled New York Times versus Sullivan, the Supreme Court of the United States established very high procedural burdens for the vast majority of libel plaintiffs to meet before a media defendant even goes to trial.

The Court's decisions contemplated that a determination of whether or not these burdens could be met should occur at the summary judgment stage. And that's what Senator Turner was alluding to earlier.

Now, yet this judicial process of in effect culling out unmeritorious cases obviously isn't being followed and if we rely - rely again on statistics, the 75% numbers compelling as a comment on - on what' been happening in our courts, begs the question why are these cases allowed to go to trial in the first place.

And as I'll mention in a minute, the cost of that can be quite extraordinary. What we're experiencing in Texas is that media defendants of all sizes and, of course, the larger organizations tend to get the majority of the suits but it does cut all the way across the very small markets, are required to incur very substantial and oftentimes ruinous expenses just in order to defend our right not to be tried at all to address this Constitutional question.

Our fundamental principle is that freedom of expression is no freedom at all if the speaker is bankrupted or seriously weakened as a result of defending that freedom.

Now, these costs for large cases can run well under the millions of dollars end to end going through the appeal process in almost any even are in the hundreds of thousands of dollars of which when related to smaller entities can be more than - than chilling - I would suggest even intimidating.

For the smaller newspapers, radio and television stations, this appellate victory or the prospect of an appellate victory can be Phyrric - Uh - in - in mythological terms they've ultimately won the battle all right, but their ability to continue publishing or broadcasting is substantially impaired.

And more importantly I think their interest or intent to undertake reporting that might be contradic - - controversial is significantly eroded; uh - impaired - uh - in some cases just vanishes. They cease to - to be willing to take those kinds of risks.

So, any result that forces the press to choose between these First Amendment protections and the kind of exchange of ideas and public policy issues that Senator Turner addressed, was obviously never intended by the framers of the U.S. Constitution or the Texas Constitution, and that's what we're trying to address here.

Our feeling is that unless the unmeritorious libel cases are sorted out on a pre-trial or summary judgment level, that our overall protection suffers. This Bill, Senate Bill 76, would allow a libel plaintiff or defendant to make an accelerated interlocutory appeal from the denial of a summary judgment motion.

The Bill would be extremely useful because it would permit two layers of appellate review on the merits of the plaintiff's claims, or the media defendant's defense before the case enters the time consuming and expensive trial phase.

Senator, you asked a moment ago how many cases are we talking about, I believe between 25 and 30 cases were filed in Texas in 1992. This isn't a huge number of cases, but once they go past the summary judgment phase, they become extremely complex, can run four to six weeks, and aside from the expense, have the potential to tie up the appellate courts in a way that's much more I think counter-productive than - than having a few cases go up from summary judgment and be dealt with.

And now, obviously the tie-back to the First Amendment protection is this appellate process is going to ensure the application of Constitutional questions at that early phase.

It's important to stress that this Bill SB 76 is not designed to inhibit or condition a plaintiff's right to bring a libel suit against any media company. We - We don't in our Coalition ever expect to be immunized from lawsuits. If we haven't done our job right, then we deserve to have our conduct reviewed by a judge and a jury and presumably pay the right - the price.

We have the right of appeal on that case, but that's the way the process should work. We're not trying to alter that in any way.

In our view, the proposed legislation doesn't prohibit or limit legitimate grievances against the media being tried in Texas Courts, and if there is substance to a plaintiff's claim, it's going to be heard by the Jury, and it should be heard. This is no change from our present system.

Mr. Chairman, within this Coalition, we have newspapers dating back

almost a hundred and eight years, a number of our members have been in business that long, radio and television stations 40 to 50 years old in this State, and I'd like to think that what distinguishes Texas and the press in Texas from any other States in this country is our historical and national reputation for free, open and often robust debate on public issues throughout the State.

I know if I ask any of you here, or your Colleagues in the Legislature, there'd be plenty of complaints about the media in your own districts. That's to be expected.

We're reporters first and business men and business women next, but I also think that you'd agree that this tradition of an open and - and sometimes raucous discourse has been very productive for the State and has helped foster the appropriate kind of debate on public issues.

This critical role is coming at an ever-increasing price for the members of our Coalition. I can assure you that companies like Belo and the other larger companies represented are willing to pay the price for free and open debate to pay the litigation costs, the insurance premiums, and in some cases if we're found to have erred, pay the judgments.

But not all of us can afford it and none of us should have to stand trial on unmeritorious claims, and in that context we think some help; is needed from the Legislature and that's what we're seeking through the procedural safeguard in SB 76.

We can't afford to permit a situation to continue where the prospect exists of limiting public debate. We thank you for your interest in this Bill and I'd be happy to answer any questions or refer to our experts who are here with us this morning.

THE CHAIR: Any - Any questions of Mr. Deckert?

SENATOR CARRICKER: Yep. Mr. Chairman, . . .

THE CHAIR: Senator Carricker.

SENATOR CARRICKER: Uhm. Could you hear the question I asked Senator Turner a little earlier?

MR. DEKERT: Yes, sir.

SENATOR CARRICKER: About why the press should have this option and an individual should not?

MR. DECKERT: Let - Let me address that, and, again defer to Kirte Kinser for more a more detailed answer. When we talked about this this morning, the language clearly is evolved from the original form. -

I think one way to get comfortable with it is to turn the prism around and realize that as things stand today, anyone who wants to invoke First Amendment or Constitutional protections for free speech or - or - or freedom of the press, has to meet that test when they take a case to court or - or they're defending a case in court.

The act of suing that person for libel or slander or the decision to sue for libel or slander is being made outside of - of that test. So once an action is brought against a defendant, the defendant first has to prove up in court that he or she, if it's an individual or an entity, a newsletter, Senator Turner said, is protected by the First Amendment. So that's not being altered through this Bill.

What's being changed is that once you meet that test, if you are found to come under the definition of media, however broadly the court chooses to apply it, then you have the opportunity to take the summary judgment decision and go up for appeal rather than get into this prolonged and

expensive and - and sometimes we think unmeritorious trial process.

But the definition of who's - - who the press is, the media is, or not, isn't being addressed in this Bill, and I don't think that was the intent to begin with. You're right that the language would - as it's evolved, gives the flavor of a change of intent. But I think it's not the case, Senator, I - -

SENATOR CARRICKER: Is it then your contention that Constitutionally there is a difference between the - the standards and the applications for free speech for individuals as for the press?

MR. DECKERT: Well, again, one -- Let me defer to Kirte. The answer is that's the body of law that the, beginning with *Times versus Sullivan,* the whole libel and slander area as it relates to the media has been differentiated from the other First Amendment protections of freedom of speech, so there - there in that sense are two bodies of law within the same general - - Perry or Kirte Kinser can certainly address that - -

_____: Okay.

MR,. DECKERT: - - in more detail.

_____: Okay.

SENATOR TURNER: We can call Mr. Kinser up right now if you want to, Mr. Chairman, and get that - -

THE CHAIR: Your pleasure, _____.

_____: - - by whatever you say. You're -

SENATOR TURNER: Mr. Kinser, if you will, come - come on up and give Senator Carricker a clear view - -

THE CHAIR: You are the sponsor of that Bill and I am Co-Sponsor.

_____: I'd like to hold off, but you know what sympathy is.

[LAUGHTER]

MR. KINSER: Thank you, Mr. Chairman. My name is Kirte Kinser. I'm a principal in the law firm of Magure, Craddock, Strother and Lutes in Dallas. And a large part of my practice is in counseling members of the media and others in areas of First Amendment.

Senator Carricker, as to your question, there are some distinctions in the First Amendment as it deals with some particular standards that have to be proven depending on what type of plaintiff you have and what type of defendant you have, and sometimes that distinction is based upon whether the defendant is a member of the media or - or not.

The reason why the amendment is drafted the way it is, much like the reason that the cost amendment is drafted the way it is, is because of concerns that were addressed from both sides of the Bar to make sure that this particular piece of legislation is as Dirk - - narrowly drawn as possible to accomplish the purpose and the problem as we perceive it in the State.

Most particlarly we do not wish to include in this Amendment such things as employer conduct as it relates to its employees or other actions under the Deceptive Trade Practices Act or warranties or anything that might be declared quote unquote "a publication," and it was in fact at - at the request of the plaintiffs' bar that this particular Amendment be drafted in a way that was limited to the media in an effort to - to hit point, if you will.

And, in the State of Texas as across the country, the most significant number of cases as well as the most significant number of large trials that take the most time and the most money and use the most Judicial resources are those cases brought against the media.

It is indeed a rare circumstances in which one pricate individual will

undertake the expense of litigation against another private individual over the basis of what somebody's written in a letter.

Although that possibility does exist and a p- - a individual would be entitled to assert whatever First Amendment rights have been granted to them, in reality the problem lies in the administration of justice when you're dealing with the large cases where there are large stakes of money at - at - - Excuse me - - large amounts of money at stake.

SENATOR CARRICKER: So - So Belo gets the opportunity to an interlocutory appeal and Carricker doesn't.

[Chuckle]

_____: That's one way of saying it.

MR. KINSER: That is one way of saying it, Senator, and basic- -

_____: Does - Does - Does that also imply that that Belo has implicitly less responsibility and freedom of speech than Carricker?

MR. KINSER: No, Senator. I think that would - that would not be a correct characterization. We are both attempting in any way to change the standards by which speech or the abuse of that speech is judged in the courts, but simply to address the problem with the administration of justice in situations where an extreme amount of time is - is taken in the judicial system for cases that are constitutionally at least unmeritorious.

SENATOR CARRICKER: I - I certainly understand and certainly concur and have no problem with the - the thrust of the Bill - uh - I'd - I'd kind of like to be under it myself.

(Laughter)

_____: Why? Are you about to say something

(Laughter)

MR. KINSER: Well, Senator, better - you do enjoy absolute immunities.

SENATOR WEST: Mr. Deckert, thank you for your testimony this morning. It sounds like we're going to be on the same side when we start talking about judicial re-districting. It sounds a little we need to kind of do something with our judicial system.

When we start looking at this statute, do you have any idea how many of the States have similar statutes which allows for interlocutory appeals in similar situations?

MR. DECKERT: Senator West, there's more than 20 - Kirte, what the number?

MR. KINSER: Yeah. Nearly one-half of the other States, as well as the Federal Courts, allow interlocutory appeals under some form, or another, so we are certainly not the trail blazer. The advantage that we have, Senator, is that we can look at their experiences and create a system that is less burdensome and less awkward than what most of the other States have adopted.

In some States they require three levels of a - a review before it gets to the Court of Appeals. And this Bill would allow to strip away those extra layers and - and get to the heart of the matter and get it done.

SENATOR WEST: And the basis for those statutes are arguments of Senator Turner and Mr. Deckert as - as advanced about frivolous lawsuits and frivolous decisions by judges, is that correct?

MR. KINSER: Uhm, I - I think it - it - - Again, it stems from concern for the efficient administration of justice.

SENATOR WEST: So, that the - - So the answer to my question would

be yes?

(Laughter)

MR DECKERT: My answer is yes, Senator. If I may add to the response to your question concerning other States, it's important to keep in mind that in the media, as in so many other things, Texas represents disproportionately a large number of the organizations that exist in this country.

So, while half the other States may have procedures essentially the same as this one, when you bring Texas under such a procedure where successful with this Bill, then you're going to affect an disproportionately large number of newspapers, television stations and radio stations most of them very small by comparison to - to our operations, for example, Senator.

THE CHAIR: Senator Henderson.

SENATOR HENDERSON: I guess I'm trying to understand to there's only 20 or 25 cases, something like that - -

MR. DECKERT: That's filed in 1992 reported. Yeah.

SENATOR HENDERSON: You know, there's lots of - of - summary judgments filed or denied on all kinds of litigation, complicated and simple.

MR. DECKERT: Uh hum.

SENATOR HENDERSON: And you have Constitutional questions about . . and I'm - I'm trying to understand why we should make a special interest exception for you and your client when we don't for the rest of the citizens of the State of Texas but very limited things that you can appeal a denial of summary judgment for. And I - And so far, at least in my mind,

you hadn't made the case.

MR. DECKERT: Well, of course, this - this permits an appeal by either the plaintiff or the defendant of a summary judgment motion. The other five instances, Kirte, you might want to refer to those and then I'll - I'm going to try to address that larger question.

MR. KINSER: Well, at - at the present there are five circumstance in Texas in which interlocutory appeals are permitted.

SENATOR HENDERSON: Yeah. I'm looking at them.

MR KINSER: Okay. And certainly, whenever a summary judgment is granted that disposes of the case, that is - -

SENATOR HENDERSON: - - an appeal.

MR. KINSER: - - appealable.

SENATOR HENDERSON: Order. But a denial - -

MR. KINSER: A denial has - - is generally not appealable in Texas and under procedure is really never reviewable because you cannot appeal it immediately. Once the trial has taken place, a denial of the motion for summary judgment becomes moot and is therefore not reviewable and such procedures as a Writ of Mandamus or Bill of Review are also in - determined not available in these circumstances.

The reason why we feel that this particular legislation is necessary is because we are dealing with really the cornerstone of all the other rights that we do have; without the ability to say or write what we wish and without the fear of being hailed into Court every time; really don't have the ability to enforce the other rights.

SENATOR HENDERSON: Well, you know, sometimes people lie.

MR. KINSER: Yes, sir.

SENATOR HENDERSON: And - And - And the people that they lie about are entitled to take them to Court. And if it - We're talking about a technical change -

MR. KINSER: Right.

SENATOR HENDERSON: - - in procedural courtroom law. And it seems to me that this extends the litigation perhaps rather than shortens it.

MR. KINSER: If I may address that, Senator. It is in fact a technical change only in procedure and not in substance of law.

SENATOR HENDERSON: Yeah.

MR. KINSER: And if a person in fact has a claim, it will be prosecuted and - and the defendant will be held liable for it, and this does not change that. But because it's an interlocutory appeal under Texas procedure, first of all it is a - it does not stay the underlying proceeding.

If the appeal is taken, the underlying trial procedure may continue at the discretion of the trial judge and can in fact go to trial if the Appellate Court does not review the matter before that time comes.

So it is not a device by which the media or anyone else can use it for the purpose of delay. It's not like a normal appeal or some other type of special remedy where the - where the trial would be stayed or the underlying procedure would be stayed. It continues on.

Second of all, an interlocutory appeal under established Texas procedure, is an accelerated appeal. The time tables are shortened for filing your briefs, for getting your motions in, for getting the hearing done.

And therefore, it not only can it not be used for delay, but it's procedure that's really built for speed. Get it done, get it over with, and get back to the business.

And so we don't think this is a - a process that can be used for any purpose other than for the legitimate purpose of taking up the issues under the First Amendment.

Now, there are also plenty of procedures and remedies available at the Appellate Court. In the event that the Appellate Court determines that it is a frivolous appeal or taken for improper purposes, the Appellate Court has the direction and the ability to sanction the Appellant in those circumstance.

MR. DECKERT: If - If you - senator if you carry that theme and relate it to some of the statistics I cited earlier, let's say that instead of a 75/25 history that we know exists here and across the United States in terms of appeals decisions show they relate to the trial judgments, even if it's 50/50, that says that half of the claims being brought for libel and slander in media-related cases don't stand up to the Constitutional tests, and this technical change permits the Court of Appeals on an expedited or accelerated basis to deal with those cases where it's clearly a case that isn't gonna stand on appeal and send them back down and in effect will change the judge's decision _____ (not understandable)

SENATOR HENDERSON: Only in 25 cases just doesn't sound like very many cases.

MR. DECKERT: Well, but there - that's where you go to the public policy side of this. First of all, the time and expense is extraordinary in these cases - -

SENATOR HENDERSON: And for many other cases.

MR. DECKERT: I understand that. Four to six weeks. In the costs as it affects companies large and small, the public policy issues I believe are

first because of the trend and the size of judgments and what's happening at the trial court level, it is becoming increasingly difficult for medium and small-size newspapers and radio stations, not to mention the larger companies that are mostly the defendants in these cases, to obtain adequate libel insurance or at least levels which reassure them that in the event they find themselves in one of these actions, they can defend themselves without facing financial ruin.

SENATOR HENDERSON: Why is it more and more difficult for them not obtain libel insurance?

MR. DECKERT: Because, unfortunately, as in some -

SENATOR HENDERSON: Buying more or I mean -

_____: Well, - -

SENATOR HENDERSON: - - for cases going to go away or what?

MR. DECKERT: As - I think the recent record would show in Texas the size of libel judgments has trebled, quadrupled, gone literally off the charts, and aside from the fact the State is developing a reputation in this area as in others for extraordinarily high judgments, those judgments in turn affect the insurance rate that anyone pays for libel insurance.

SENATOR HENDERSON: Last big one I remember was, they found the company liable, but they gave them no damages.

MR. DECKERT: I'm not sure that is - -

SENATOR HENDERSON: Channel 13 Houston was one of those channels.

MR. DECKERT: KTRK Capitol Cities is ABC.

SENATOR HENDERSON: Capital Cities they got a judgment against them, said yeah that they were wrong, but they they didn't grant any

damages. So, on this last one I remember - -

MR. DECKERT: The - The most notorious one I'm sorry to say, we were the defendant, is the largest libel judgment in the history of the United States - - $59 million dollars. _____ (Not understandable - blocked out)

SENATOR HENDERSON: I guess I ought to remember that one, but -- (Laughter)

_____: _____ court money.

MR. DECKERT: And the problem is the Constitutional questions are never addressed because with those kinds of judgments and the proclivity of insurance companies to exit at that point of the proceeding, it never goes to appeal. So the - the issues of whether someone's a public figure or whether there are other First amendment protections apply, aren't being tested, and that is I believe contrary to the intent of - -

SENATOR HENDERSON: What - What was the style of that case, I don't - -

MR. DECKERT: The style of that case?

SENATOR HENDERSON: Oh, that was the District Attorney - -

MR DECKERT: Correct.

SENATOR HENDERSON: - - at Waco?

MR. DECKERT: Uh hum.

_____: Uh - Mr. Chairman - -

SENATOR LUNA: Am I correct that summary judgments do not relate to the amount of the judgment only whether there is libel or not?

MR. DECKERT: Well, again, I'll defer to our - our expert, but a summary judgment motion in libel cases is generally entered early in the

proceeding - -

SENATOR LUNA: I understand what --

MR. DECKERT: - - and asks for the _____

SENATOR LUNA: But a summary judgment does not assess damages. That has to be tried.

MR. DECKERT: Correct. Absolutely.

SENATOR LUNA: So these - these issues that you're bringing up, horrendous amounts of judgments, don't have anything to do with summary judgments.

MR. KINSER: Senator, actually, there would be two ways to address that., If it were defendant who was raising the motion for summary judgment, it would be on the issue of liability or not - -

SENATOR LUNA: I understand.

MR. KINSER: - - and if the judgment was rendered in favor, then there would be no damages to be considered because there'd be no liability _____.

SENATOR LUNA: But on the opposite, - -

MR. KINSER: If it were a plaintiff, which a plaintiff would be entitled to - to operate under this legislation, then the issue could be either one of liability or one of damages.

SENATOR LUNA: Will _____

MR. KINSER: But a - -

SENATOR LUNA: Are you telling me that damages are assessed by summary judgment?

MR. KINSER: They can be where they meet the standard. It's not often that they are, Senator, because damages usually involve some fact issues

that can't be determined on summary judgment. But a plaintiff could take advantage of this in determination of whether for example he was a private figure or not - -

SENATOR LUNA: But then the issue - -

MR KINSER: - - or whether it was a defamatory statement or not.

SENATOR LUNA: The issue of divorcing the excesses judgments and these summary judgments are not really related.

MR. KINSER: Senator, the - - that's correct. Our intent is not to address those circumstances in which there are legitimate and - and - and damages should be awarded because there was an error made in the reporting process. It's really directed more to the incredible cost of defending the unmeritorious cases that we intend this legislation to address where the courts eventually would say that you have a First Amendment right not to be sued and not to be tried, that you've had to go through the cost of a trial to - -

SENATOR LUNA: I don't necessarily - -

MR. KINSER: - - to get to the point.

SENATOR LUNA: - - uh - - oppose that but I don't want to bring in discussions of excesses judgments with summary judgments. I - I don't think they relate. The other thing that I was wanting to ask, when you were talking about the data of 75, 25, that sort of thing, uh, is that cases that were tried or old or cases that involved summary judgments only?

MR. KINSER: The statistical information came from a national survey from the Libel Defense Resource Center that dealt with cases that were tried both to juries and to judges and then - -

SENATOR LUNA: Well, then, since - - Let's not speak to irrelevant to

summary judgments either.

MR. KINSER: Senator, with all respect, I think that it does in the sense that these were cases. The 65% that were reversed on appeal were usually reversed on issues that should've been decided at the summary judgment stage.

But because there was no way to appeal the denial, they had to go through trial and then the Appellate Section, so it does relate, because most of those cases would be resolved at the trial level rather than before trial, as opposed to having to go through the cost of trial and then the appeal.

There was a study done in - in New York State on cases and New York does allow an interlocutory appeal. And about 90% of the cases - -

SENATOR LUNA: You have any way to differentiate that data what was or should've been relieved - sought relief by summary judgment?

MR. KINSER: This study in New York, Senator, was done on cases that - that in fact summary judgment was granted or denied at the trial level. In New York, you're allowed to take up both on - on an interlocutory appeal. And so they studied both those that were granted and both that were denied. And in about 90% of the cases, the Appellate Court said that summary judgment should have been granted.

SENATOR LUNA: Thank You.

THE CHAIR: Senator Leedham?

SENATOR LEEDHAM: Somewhere along ago, somebody explained the law to me, and in one of the laws of - known as I guess they teach it in college, is deep pockets. And, of course, basically the clients that you have in this Coalition have - have the deep pockets.

As we've become a litenous (phonetical spelling) society more and

more, we lose sight; I believe my question to you is, all these legal expenses that are represented by everybody you're talking about, sooner or later, if the company stays in business, has to become a part of their operating expense, would that not be considered true?

MR. DECKERT: Correct. Yes.

SENATOR LEEDHAM: That being the case, and we sometimes think, Well, this company's making money and what does a consumer have to get out of it, or I get out my question to you, Mr. Deckert, would be, if the media stays in business, and I think all of us would dread the day it didn't. Uh, it's main source of revenue is advertising, is that not really correct?

MR. DECKERT: Yes, sir.

SENATOR LEEDHAM: And, to the degree the advertisers spend their money wishing that the rates were lower, I know that advertisers wish the rates could be lower, but your rates within reason are - are set by competitive atmosphere, certainly a TV station versus TV stations maybe in Dallas you have a little bit of a unique monopoly right now, but a great majority of the media has to set their advertising rates somewhat in face of the competition the same or otherwise harm someone.

MR. KINSER: It is only within the context of operating as a member of the media that you would have the opportunity to take an interlocutory - Un - -

MR. DECKERT: Yes, sir.

SENATOR SIBLEY: Would you tell me why that's true, looking at the four corners of the document?

_____: Hold on just a second.

MR. DECKERT: Senator, --

SENATOR SIBLEY: I'm not talking about intent. I know what your

intent is. I'm talking about looking at the four corners of the document here. Tell me why you're not setting up a special class of people. Who can say something as private citizens and have a right to an interlocutory appeal and Senator Carricker doesn't.

_____: Senator Carricker.

MR. KINSER: Senators, it was certainly our purpose to draft a carefully worded piece of legislation and a - - where it says that it may be brought claim against or defense by a member of the electronic or print media. Don't think courts. At least we would hope the courts would not reasonably read that as saying that simply because he's employed as a reporter for a newspaper, that he has the freedom outside of that context - -

SENATOR SIBLEY: Okay.

MR. KINSER: - - to be afforded the protections of this - this particular piece of legislation.

_____: That'd be correct.

MR. KINSER: He has to be operating within the context of - of a member of the media.

SENATOR SIBLEY: I like - I like the intent of the Bill, - -

MR. KINSER: Uh hum.

SENATOR SIBLEY: - - but I - I think we ought to mean what we say and say what we mean in legislation so that we don't have to start talking about legislative intent. There has to be a way to word this.

SENATOR CARRICKER: Mr. Chairman, if - if I could respond to Senator Sibley on that question. Senator Sibley, it appears to me that if a member of the press intended to defame or harm someone, they could do so much more effectively in their capacity as a member of the press rather

than as a private citizen. So they automatically afford themselves this protection anyway.

SENATOR SIBLEY: I agree.

MR. KINSER: Certainly we would not be opposed to - to any sort of refinement to this that would make that quite clear that - that the intent was only acting in the capacity or within the professional activities of a member of the media.

SENATOR SIBLEY: Well, looks to me like in the attempt to avoid the other - the unintended result of the DTPA or whatever, we - we've kind of flipped back and the other way and we're creating, looks to me, like a special class of people You know, I'd love - You know, I may start my underground newspaper so I can go and - - You know, I can have this right.

So, you know, I'm sure Senator Turner and all of you all can put your heads together, but that to me really creates a problem, and I do think it's a good idea to - to have this sort of interlocutory appeal.

I don't understand why we wouldn't want to let everybody have it, though. I mean, it's good for the newspapers. I don't understand why Senator Carricker should not be able to avail himself of that. If he's denied, what is the harm?

Even if you had a DTPA or some other unintended result, what would be the harm of allowing an interlocutory appeal? What - What is it we're trying to prevent?

_____: Appeals Court wouldn't have anything else to _____ him.

_____: _____ plaintiffs attorney _____

MR. KINSER: The underlying - - The underlying concern, Senator, is that we don't want to - to open the flood gates of appeals and allow people to - to try and manipulate the system just to get under this - this procedure. The reason, again, that it was - it's limited the way it is, is because of the concerns expressed by members of the Plaintiff Bar on that issue.

SENATOR SIBLEY: I'll tell you what _____

SENATOR SIBLEY: If we deny out - or - If we didn't accept the Amendment and just save our legislative intent, we don't mean DTPA, would that - and let the courts hash that out?

MR, KINSER: Again that would be acceptable to us.

_____: All right.

THE CHAIR: Senator Sibley?

SENATOR TURNER: I think Dean Udhoff can offer some comments. It may be helpful to you, too, if - if the Chairman would allow me - -

THE CHAIR: Uh hum

_____: _____

_____: Yes.

MR UDHOFF: To answer your question, - -

_____: Well, I'm sorry.

THE CHAIR: Why don't you state your name for the record?

ARNIE UDHOFF: Arnie Udhoff, lawyer in Austin.

THE CHAIR: Okay.

MR UDHOFF: There is a special Constitutional nitch. We're only talking about cases where there's a Constitutional - a defense or the claim is based upon the Constitution and on the First Amendment, so that eliminates the vast majority of cases in the State.

I mean, there is great dispute as to under what circumstances one can take a matter away from a jury in a - in a trial court. And rather than get into that dispute about which people disagree vehemently, the point of this I think is just to say this is an area that for all practical purposes has been federalized.

In other words, the - the decisions of the United States Supreme Court say that the Appellate Courts must exercise independent review of the facts with respect to actual malice and the like.

That is, whatever Texas procedure is in other cases, it has to operate this way in the Court of Appeals. And it has to be - the definition of malice has to be the Federal definition of mala - - of malice. The burden of proof has to be in accordance with the Federal Rules and not the State Rules - -

_____: Got a moment.

MR. UDHOFF: - - and - - so there is - There's a whole special line of cases here, and we could argue, in a sense, till the cows come home, about whether it should've been extended to all private individuals who write defamatory letters and things like that, but at least so far, it has not primarily because it come out of this sort of seditious libel public matter type of concern. And - And I think that's really the answer to your question.

It's a different principle. It - The principle that there may be one cases that got to trial that should not generally is one that affects all types of litigants and litigations.

But this sort of special panlophy of Constitutional defense in defamation and to some extent in emotional - - intentional infliction of emotional distress is just a separate body of law.

And that's why here the change is not all that consequential, other than

to save the money. The - The Appellate Court may not defer to that Jury verdict in the same way that it would defer to that Jury verdict if it were a guardian for any products liability case, because the whole - the whole thrust of it has been Federalized in the Federal Constitutional Front Principles Trump in this area.

SENATOR SIBLEY: But at this point there's been - There will have been no Jury trial. There's no decision really, no Jury to defer to. And my question was, it looks like from the Amendment that we're creating a special group of people whereby a member of the electronic media who says something as a private citizen. Now, as I read this looking at the four corners of the Bill, or this Amendment -

_____: But by - - I'm sorry.

_____: No. Go ahead.

MR. UDHOFF: But my answer, Senator, would simply be - - I mean, if you consider a special interest group or - or a sort of special standard, that standard is created by the First Amendment,. †here's a press clause in - in the First Amendment, and these cases. *New York Times versus Sullivan* have interpreted that First Amendment to give these sorts of protections over the last 30 years.

SENATOR SIBLEY: They don't need us to do it then. If they already have that, why do they need us?

MR. UDHOFF: The problem in the case is that what frequently happens with three-quarters of the cases, and this is not just in Texas but around the country, being reversed, there is a tendency in many States where the trial judge just simply said, Well, I'll let it go to trial, it goes to trial, there is a damage recovery and then on appeal it is overturned on

these Federal Constitutional grounds with independent review.

And people have written articles and said this is a very strange sort of phenomena; we're - we're - the reversal rate is so high on Constitutional grounds, it must be because some District Judges aren't paying very close attention to these Federal Rules that are applicable in this type of a case.

So you have the worst of all worlds in a way. You hae all the cost of a trial, and then you have appellate review that ignores what the Judge and the Jury have done at the trial level.

As I understand the Bill is to avoid that problem. If it's going to be reversed anyhow, you mig[illegible] as well reverse it early in the process.

SENATOR SIBLEY: You understand that I agree with that principle.

_____: Yeah.

SENATOR SIBLEY: What my problem is, is how can we avoid creating a special group of people who as private citizens say something and then because theu are a reporterm now, they don't - - they have some protectons, or they have something that Senator Carricker doesn't have when they said exasctly the same thing in exactly the same role.

That's - That's my only problem I have.

MR. DECKERT: Senator Sibley, if - if I may, and it's Senator Turner's legislation, but we're amenable to inserting a phrase or phrases that clearly eliminates that problem. That's not the intent, and - and we don't want the absence of that phrase to enable any class.

SENATOR SIBLEY: Why don't we not amend it, and then amend it from the floor when you all have the language worked.

SENATOR TURNER: That'd be fine. I - I - I think - - I don't know - - Kirte?

SENATOR TURNER: Who expressed a point of view. I really would be surprised if any judge would interpret the language member of the electronic or print media to cover a news reporter out here acting just like you or a - under character would in statements and - and - and things that we might say you're right.

But to clear it up, I think we can put some language in there that will pin it down and - and assure you that that would never happen.

_____: Right.

THE CHAIR: Any further questions of these witnesses?

_____: Yeah. Just -

_____: Go ahead a little bit.

SENATOR HENDERSON: Mr. Udhoff?

SENATOR HENDERSON: Am I given to understand what - I'm trying to understand what - what you're saying. This is a money Bill; right? I mean, you - you're trying to save some money.

MR. UDHOFF: This - This is a Bill - - I mean this - the reasons I would give for it, if - if you're going to lose or in First Amendment principles anyhow, you being the plaintiff, the earlier in the process that message is communicated, the lower the communication fee.

_____: (Not Understandable)

SENATOR HENDERSON: Second, it seems like to me that I mean you - -

_____: Yeah.

SENATOR HENDERSON: - - sometimes in - in this - in the litigation process you have unequal parties. Either you've got people with money in their pockets, and you've got people that don't have money in their pockets.

MR. UDHOFF: Yeah.

SENATOR HENDERSON: Both of them have got to figure out a way to pay to go through the litigation. I've been around the block a few times and this would - - it - it - it might be and I can't - - and convince me that I'm wrong on this - this might be just another way for the people who do, who can afford to pay their lawyers, to extend the cost of litigation to the point where the other side can't compete with them any more and has to go away or settle.

MR. UDHOFF: I don't understand how it would add to their litigation cost.

SENATOR HENDERSON: An appeal?

MR. UDHOFF: No.

SENATOR HENDERSON: It's another step that they have to take.

MR. UDHOFF: It avoids a trial. With the trial - -

SENATOR HENDERSON: Only if you - -

MR. UDHOFF: _____

SENATOR HENDERSON: Only if they're wrong.

MR UDHOFF: The appeal - - Yes. But - But the point is they're apparently wrong in three-quarters of the classes.

SENATOR HENDERSON: Well, but - you can't make - I mean --

SENATOR HENDERSON: Excuse me. But each case is separate and - and - I mean, evidently there's one that that your folks had a serious problem with, so each case is its own - -

MR. UDHOFF: No. It's - - It's really - -

SENATOR HENDERSON: You _____ can't go on statistics - -

MR. UDHOFF: Well, I guess - -

SENATOR HENDERSON: - - on something like this. You've got to go on a case by case basis and who has the right to be in the Courthouse.

MR. UDHOFF: I, Senator, I respectfully disagree. In these cases, they all read virtually the same way, and that is, the actual malice the public figures doctrine one of the Constitutional doctrines was messed up in the trial court and if you have a system that has a reversal rate that is that high, the more promptly you provide for an interlocutory appeal, the more in litigation expenses you will save, the more trial judge time you will save so the trial judge can go on to other cases.

I mean, I - I - I don't see what's gained in a system that pays litigation expenses for the trial at 100% of the cases when it's 75% not only in Texas, nationally, based upon a sort of ignorance of the Constitutional principles that apply.

I - I - I just don't - don't understand that. And - - (not understandable)

SENATOR HENDERSON: It also lets you go ahead of everybody else who has a right to be in the - in the Appellate Court. You say these are taken on an expedited basis.

MR UDHOFF: Well, that is - is related, I mean, to the type of interest that's at stake here, which is a First Amendment interest, and - -

_____: (Not understandable)

SENATOR HENDERSON: I mean - - And you - - And it is your client that has all the protections.

_____: (Not understandable)

_____: (Not understandable) in any of the case law and in the Constitution, and this is a technical procedural change in the statute - -

MR. UDHOFF: Senator, - -

SENATOR HENDERSON: - - seems to me, I mean, at this point, hasn't been voted yet, subject to being changed my mind, but it seems to me it's a special - it' a special treatment, let me save some money, and let me go ahead of the line, let me cut in line in front of everybody else who has a right to be in the Appellate Court.

MR. UDHOFF: I really don't understand that, but - but - I don't understand what the State's interest is in conducting full-scale trials that will be reversed on appeal.

SENATOR HENDERSON: Oh, I'm not thinking about the State's interest. I'm thinking about the individual person who has a right and under the open courts doctrine of our Constitution to be in court and see you if you're lying.

_____: Yeah.

MR. UDHOFF: The problem is in the supremacy clause of the Federal Constitutional, I know.

SENATOR HENDERSON: Well, that's all fine for the ultimate judgment. We're talking about a procedural change in the statute here that lets you cut in line.

MR. DECKERT: Senator, if - if I may try to amplify on that, I don't view this as a money Bill, if you will, No one's right to sue is limited by this. What occurs -

SENATOR HENDERSON: We're not talking about the ultimate protection or - or - or who gets the ultimate judgment here. We're talking about in what order things are taken and nothing more. And the testimony you've - - that I've heard is Gee whiz, it sure costs us a bunch of money to try these 20 or 25 cases a year; we'd sure like to cut in line. And I want you

to tell me why you need to cut in line if it's not just money.

MR. DECKERT: All right. The - The expedited aspect of it relates to having the proceeding moving forward. In other words, if you go for - - if you appeal a summary judgment motion and the trial judge says Well, I don't want to proceed with the trial, he has the right to continue the trial if - if it's in the Appeals Court for two years, obviously justice isn't being served because the trial isn't proceeding. Now, in some cases the judge may order the trial to go forward.

What this does, it assures a speedy response to the Constitutional questions that are addressed in the summary judgment and the appeal presumably of the summary judgment, but it is - - it's in that sense a - a gate keeper on the Constitutional question. More importantly, what's really happening here is the Constitutional questions are not being addressed because the cases don't go up on appeal.

SENATOR HENDERSON: What - What you're telling me, though, is you just don't like the way the trial judges are ruling on motions for summary judgment.

MR. DECKERT: No, No. That' not - -

SENATOR HENDERSON: You want - You want to take the discretion away from the trial judge and go one step ahead in front of everybody else and get a quick appeal on that before you have to try the case.

MR. DECKERT: Do you want to _____

SENATOR HENDERSON: Not like what everybody else has to do. And I - I just want to understand if it's a money deal, tell me it's a money deal. It's - It's expensive, we don't want to have to do this, Gee whiz, let us cut line and get these things over with because we think that most of these

things go our way.

MR. KINSER: Senator, if I may, there are a couple of - -

THE CHAIR: Keep time here _____

MR. KINSER: - - basic premises to this that - that may separate it from the run-of-the mill piece of litigation, one of which was it does deal with a very important crucial Constitutional right that we enjoy, that we all enjoy, and its is not unintentional that our founders of the country, I believe, put that in the very First Amendment.

SENATOR HENDERSON: I've never met a plaintiff or defendant that didn't think that their lawsuit was the most important lawsuit that ever was on the face of the earth that didn't have the most important Constitutional and civil rights involved. And I'm sure your client is the same way.

MR. KINSER: But I think that we need not look any further than what's already in the interlocutory statute to find precedent for what we're doing, which is -

SENATOR HENDERSON: I'm looking at it.

MR. KINSER: Okay. The Amendment in 1989 which added a sovereign immunity provision which said that if an employee agent of the State asserts sovereign immunity and his motion for summary judgment is denied, he may take an interlocutory appeal. That, Senator, is the determination of a right not to be sued.

SENATOR HENDERSON: I probably didn't vote for that either.

THE CHAIR: Any other questions of any of these witnesses?

_____: (Two people at same time) Mr. Chairman, - -

THE CHAIR: Senator Carricker or Senator _____ .

_____: Who was first? Who - Who did you recognize?

THE CHAIR: Whichever one of you had your hand up first.

(Laughter)

_____: I'll never make it to the _____; I'll be over there.

SENATOR CARRICKER: Mr. Chairman, I'm - I'm confused by the testimony. Earlier in an exchange between Senator Leedham and the representative of Belo's Corporation, we heard the exchange about how important public policy this was from the standpoint of the consumer because of the delivery of those services at a lower cost and that this Bill would - would cut the costs of litigation.

And then, in an exchange between the representative of Belo Corporation and Senator Henderson, representative of Belo Corporation clearly said this is not a money Bill.

I think that there is a meritorious aspect to speeding litigation and getting to a court where a Constitutional question can be decided, and I understand that many lower courts are un - are very uh uh ticklish about deciding Constitutional questions. They do not wish to do so on summary judgment.

But I really need to know which this is --a money Bill as the exchange with Senator Leedham would indicate, or not a money Bill as what has been indicated by Senator Henderson.

MR. DECKERT: Senator - Senator Carricker, I - I believe that I responded to Senator Leedham's question and - - and agreed with him that an indirect effect of this Bill is potentially to reduce costs in a way that would flow through to consumers, but that is not our premise.

The premise is the Constitutional one and in terms of how this affects

this very large number of newspapers, television and radio stations of all sizes is the - the so-called chilling effect of the environment as it currently exists which inhibits particularly medium and smaller size newspapers, television stations and radio stations from even entertaining some kinds of reporting, and we think that's inconsistent with Texas history of an - of an open public discourse on matters of public policy, the Constitutional umbrella protects those kinds of - of debates and discourses.

So that's our primary interest, and - and my response to Senator Leedham was just that response.

SENATOR CARRICKER: I understand that your costs of insuring yourselves against lying is very substantial. Are not premiums based on experience?

MR. DECKERT: They are - They are based on experience in any national pool, insurance pool. Uh, the truth is Texas is leading the way in the size of those judgments, and it's affecting rates all over this country.

SENATOR CARRICKER: So, in your view, the amount of judgments in the case where the plaintiff prevails and - and the courts decide the plaintiff had a case, are excessive.

MR. DECKERT: Unfortunately, these cases never went to appeal to address the Constitutional questions, so I can't - - I really can't respond to that.

SENATOR CARRICKER: Why would they not have gone to appeal?

MR. DECKERT: Because the insurance companies bail out and they - they refuse to go up the appeal ladder with you, and so companies even our size are faced with the prospect of an entire judgment standing without the Constitutional - or - or with the Constitutional question being heard or

settling.

SENATOR CARRICKER: Are you telling me that when the amount in question is greater, that there is less tendency to appeal that amount than when the amount is smaller? That seems to be contrary to - - logic.

MR., DECKERT: It - It depends - It depends on where the insurer fits into that picture. For a company particularly a medium and small size company to - -

(Gong heard)

THE CHAIR: That's our new bell. It's not a fire.

MR. DECKERT: Am I - Am I finished with Mr. Chairman?

(LAUGHTER)

THE CHAIR: we have a sus - - a new - - Our regular bell is broken, and this is a new alarm system to let us know - - It's not an alarm system, but a new bell to let us know we take up in ten minutes.

([THREE PEOPLE TALKING AT THE SAME TIME]

THE CHAIR: Senator West.

SENATOR WEST: I just have a question - - a couple of questions and Senator Henderson has kind of sparked my interest in a couple of areas.

When addressing the issue of Constitutional issues and part of the rationale is the First Amendment Freedom of the Press, and that this body of law that protects the press is basically emerged in the Federal - in Federal Jurisprudence, in essence what's happening in expediting an appeal so issues can be resolved is that you are in fact stepping in line in front of someone else.

And we're talking about the right of the press. What about other rights,

such as a person's - - where a persons's liberty is being taken away because of the - of a decision say on a Fourth Amendment issue - - a search and seizure issue - - what about a Federal Constitutional right where you have discrimination involved, should those classes - - is the press - - is the press's rights under the Constitution greater than the rights of other individuals uh - uh - say from a Fourth Amendment rights - Fifth Amendment rights and rights against being discriminated against, tell me with that.

MR. UDHOFF: Could I - Could I answer partly, Senator, the - - Uh, first you have to recognize there's concurrent jurisdiction in many of these cases --

_____: Sure.

MR., UDHOFF: - - in the State and Federal Court - -

_____: Uh huh.

_____: - - and a lot of the cases that you described will be filed in Federal Court - - (Blocked out by other person talking at same time)

SENATOR WEST: Same thing about - - Same thing about - - Same thing about press cases too.

_____: Uh, - -

_____: _____

MR. UDHOFF: Well, we could talk about. There may be tactical advantages in this particular area, filing and - and - -

SENATOR WEST: I mean, you do agree, but - - vases, cases that you're dealing with can also be filed - -

_____: Yes.

_____: - - in both -

MR. UDHOFF: And - And - And I think the truthful answer is that people are struggling with this in many of these areas. For example, the Speedy Trial Act type of approach is one that says deprivation versus liberty is extremely important - -

_____: That - -

MR. UDHOFF: - - and that it should be put at the top of the list in terms of making sure that it's adjudicated as rapidly as possible. I - I don't think there's an effort to say that - that - that, you know, this right, I mean it is first in the Constitution, but in - in the Amendments to the Constitution, it stands higher the Fourth Amendment or the Fifth or the Sixth or - or so forth, but, I mean, there are - there have been other - in those areas there have been techniques that have also been developed.

Many of those claims, by the way, asserted as defense and criminal prosecutions, so they're completely governed by Fourth Amendment, for example, as almost entirely in that area. But there are techniques which evolve - have evolved in other areas that deal with other Constitutional entitlement.

THE CHAIR: Any further ques--

_____: One _____

_____: Parliamentary inquiry, Mr. Chairman.

_____: Excuse me.

_____: I have a parliamentary inquiry?

THE CHAIR: Yes. state your inquiry.

_____: We've not adopted the Amendment, have we?

THE CHAIR: No, we haven't.

_____: It is my understanding that we will set the Amendment aside for _____ floor.

THE CHAIR: Well, that may be the case. We have not gotten definite to answer for pleasure so to authorize again or do -- what's your preference?

SENATOR TURNER: Uh, my - my preference would be to adopt the Amendment and then to add language to clarify the concern expressed by Senator Sibley - -

THE CHAIR: Yes. That's --

_____: - - on the floor.

THE CHAIR: That's Senator Sibley.

SENATOR SIBLEY: That's uh - - You're talking about amendment from the floor, in any case, aren't you?

_____: No.

SENATOR TURNER: Yes. That would be correct. But I think the - the substance of what we had prepared here and the fact that it has been hammered out between the plaintiffs Bar and defense Bar would indicate that we should amend the amendment on the floor rather than try to abandon the - the language that we have worked out. I think everybody will agree that your interest in clarifying that a member of the news media when not acting in that capacity is not intended to be covered by this Amendment will be acceptable to everyone, and we can add that on the floor.

SENATOR TURNER: But I would like to have Senator Rossen offer the Amendment that has been prepared that has been agreed to with the understanding it will add that clarification that you want when we get to the floor.

_____: That's the reason I'd raise the question if we could adopt the Amendment, then the testimony could be clearly in what we're doing with the understanding it's going to be amended on the floor to make it some more specific.

_____: What do you think, Senator Sibley?

SENATOR SIBLEY: I'll . . I'll . . .

_____: Mr. Chairman, - -

THE CHAIR: I've got this Amendment for adoption real quick - -

THE CHAIR: Senator Rosson's Amendment Number 1, he moves its adoption. You heard the explanation. Is there objection? The Chair hears none, it's so ordered.

THE CHAIR: Now, Senator West, - -

SENATOR WEST: Did you finish answering my questions?

_____: I understood this. I don't want -

MR. KINSER: Senator, I just want to make the point that Dean Udhoff made at the conclusion of his remarks is in that most of the issues that you raised and the concerns that you raised are usually raised in criminal law context as opposed to ci - -

SENATOR WEST: What about discrimination lawsuits?

_____: Yeah. I'm figuring _____

MR. KINSER: Discrimination lawsuits I don't think are - are necessarily considered to be less important.

SENATOR WEST: When we start talking about interlocutory appeals and being able to take up different issues before and all the litigation is resolved.

MR. KINSER: The difference, Senator, is that the United States

Supreme Court in series of decisions has placed upon libel law special rules, special considerations one of which is that the Appellate Courts have an obligation to review the case almost on a *De Novo* basis, taking the record and making their own independent judgment as opposed to deferring to the trial court as they would in all the other cases, including discrimination cases.

So the Supreme Court has set apart this area of the law for special treatment at the Appellate level.

SENATOR WEST: Okay.

MR. KINSER: And all we're truing to do is get those decisions done before we spend a lot of - -

THE CHAIR: Is there any further questions, do we want to go ahead and move this Bill out now or hear from any additional witnesses? Are there any more questions?

SENATOR SIBLEY: Was there anybody to speak against it?

THE CHAIR: No. There's nobody signed up in our position.

SENATOR NELSON: Mr. Chairman, I'd just like to make a comment. I support the concept behind this Bill, but I'm wondering, Senator Turner, if you night find a word that's easier to pronounce than interlocutory.

[LAUGHTER]

_____: It's a term of art.

_____: It's not _____.

_____: I'd like to more.

THE CHAIR: Senator Lucio mores that Senate Bill 76 as amended be reported back to the Senate with recommendation Bill passed. Clerk will call roll.

CLERK: Senator Harris.

SENATOR HARRIS: Aye.

CLERK: Senator Rossen.

SENATOR ROSSEN: Aye.

CLERK: Senator Carricker.

SENATOR CARRICKER: Aye.

CLERK: Senator Henderson.

SENATOR HENDERSON: Aye.

CLERK: Senator Leedham.

SENATOR LEEDHAM: Aye.

CLERK: Senator Lucio.

SENATOR LUCIO: Aye.

CLERK: Luna.

SENATOR LUNA: Aye.

CLERK: Nelson.

SENATOR NELSON: Aye

CLERK: Senator Patterson.

SENATOR PATTERSON: Aye.

CLERK: Senator _____

SENATOR _____: Aye.

CLERK: Senator West.

SENATOR WEST: Aye.

CLERK: Senator Whitmeyer.

SENATOR WHITMEYER: _____

THE CHAIR: Ten - Ten AYEs and no NAYs, the Bill proved favorably.

THE CHAIR: Before we go to meet, _____Senator

Moncreif has out-of-town witnesses, so we'll come back here at 2:30 briefly. It won't take long. Thank you.

_____: Thank you, Mr. Chairman.

SENATOR TURNER: Thank you very much, and thank you for your co-sponsorship of this Bill, Mr. Chairman.

[END OF TAPE]

COURT REPORTER'S CERTIFICATE

STATE OF TEXAS §
COUNTY OF WEBB §

I Carmen Sauceda, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the foregoing is a true and accurate record of the referenced audio tape which I have transcribed to the best of my ability, knowledge, skill and experience.

WITNESS my hand and seal of office this 10th day of April, A.D. 2002.

CSR TEXAS #271
EXP. 2/31/02

CARMEN SAUCEDA RPR CSR
Certified Shorthand Reporter

Tort Filings in 28 States, 1990-1999

State	Court	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Alaska	Superior	826	838	815	935	875	1,024	1,005	1,048	1,026	986
Arizona	Superior	15,418	15,442	13,842	12,940	22,815	13,776	15,116	14,934	15,006	13,480
Arkansas	Circuit	5,045	5,099	5,098	5,228	5,298	5,254	5,180	4,586	4,331	4,252
California	Superior	121,960	114,298	109,219	88,346	83,721	79,490	77,402	70,039	68,297	69,666
Colorado	Dist.,Den. Juv., Den. Prob.	5,886	6,295	6,151	5,001	4,977	4,731	4,763	4,994	4,984	4,882
Connecticut	Superior	16,477	16,266	16,250	15,947	15,642	17,932	19,211	19,903	20,036	18,887
Florida	Circuit	40,748	44,257	43,458	43,536	43,045	46,025	46,239	47,996	45,886	47,045
Florida	County	60,796	75,796	77,321	79,658	88,488	93,231	108,575	77,676	75,456	75,145
Hawaii	Circuit	2,065	2,365	2,689	2,941	2,517	2,934	2,468	2,205	2,105	1,824
Hawaii	District	1,062	969	999	932	844	1,019	809	684	651	603
Idaho	District	1,127	1,044	1,136	1,115	1,221	1,176	1,423	1,363	1,391	1,600
Idaho	Magistrates Division	290	213	189	177	166	130	132	116	82	75
Indiana	County	44	97	113	61	529	90	14	22	69	43
Indiana	Superior and Circuit	6,770	8,250	8,263	10,870	13,473	13,366	13,032	13,033	12,412	12,665
Kansas	District	4,010	4,076	4,338	4,395	4,282	5,082	5,641	6,194	6,358	5,762
Maine	Superior	1,878	1,686	1,643	1,615	1,740	1,819	1,657	1,572	1,386	1,271
Maryland	Circuit	14,908	16,270	15,612	14,989	14,485	15,427	15,540	15,517	14,769	13,458
Massachusetts	District Court Department	63,369	60,920	54,384	42,704	40,785	44,044	41,161	48,715	53,452	55,536
Massachusetts	Superior Court Department	13,437	13,721	13,957	14,000	13,774	13,854	12,982	12,299	11,602	11,127
Michigan	Circuit	38,784	31,869	34,497	35,450	39,538	30,372	52,270	24,891	23,800	22,509
Minnesota	District	7,135	7,252	7,460	6,861	6,751	6,919	6,887	7,312	6,748	6,088
Missouri	Circuit	21,680	21,245	19,999	17,883	16,960	17,506	19,495	19,344	20,757	18,953
Nevada	District	5,295	5,871	6,185	6,788	7,486	7,873	8,906	9,177	8,590	7,532
New York	Supreme and County	65,026	65,767	72,189	71,113	75,298	81,265	84,126	82,514	81,794	80,863
North Carolina	Superior	8,175	8,656	9,361	9,754	9,739	10,256	10,536	10,588	10,683	10,098
North Dakota	District	744	531	411	525	535	685	531	563	717	638
Ohio	County	430	461	413	417	391	482	349	427	559	559
Ohio	Court of Common Pleas	34,488	34,422	33,196	31,229	31,181	33,371	36,896	50,472	31,298	31,873
Ohio	Municipal	14,674	15,316	14,968	13,947	13,663	12,854	13,332	13,743	13,497	13,497
Puerto Rico	Court of First Instance	8,027	8,520	8,552	8,948	9,803	10,236	10,024	10,311	10,788	9,834
Tennessee	Circuit Criminal and Chancery	13,453	13,223	13,100	12,106	12,221	13,726	14,054	14,481	13,873	12,186
Texas	County-level	12,355	14,201	14,009	13,715	15,337	16,836	19,304	19,349	19,368	18,303
Texas	District	39,648	44,088	46,762	47,586	48,631	51,544	46,493	42,954	40,385	35,668
Utah	District	1,631	1,729	1,979	1,804	1,928	2,058	1,686	1,827	1,849	2,386
Washington	Superior	10,147	11,375	11,142	11,856	11,950	12,850	12,776	12,552	12,290	11,674
Wisconsin	Circuit	9,669	8,865	8,835	9,043	9,583	10,559	6,285	8,495	8,725	8,283
Total		667,477	681,293	678,535	644,415	689,672	679,796	716,300	671,896	645,020	629,251

J

STATE RULES ON INTERLOCUTORY APPEALS IN GENERAL*

*IF SPECIAL RULES APPLY TO LIBEL CASES OR MEDIA DEFENDANTS, THEY ARE NOTED

AL	Must be certified by Trial Court Judge
AK	Tracks Iowa, Vermont, and Wyoming
AZ	Rare----one case allowing appeal in a defamation action 761 P.2d 1131, 1133
AR	Appeal permitted from: (a) Order on Injunctive Relief (b) Certifying a Class Action (c) Other limited circumstances including a denial of motion for summary judgement. Rule 2 Arkansas Rules of Appellate Procedure.
CA	Not available in any civil action
CO	Not available in any civil action
CN	Not permitted in any civil action
DE	At discretion of Supreme Court
DC	Same as Federal Statue
FL	Not ordinarily permitted-tracks Federal Statue
GA	Limited circumstances---No expedited review in libel cases
HI	Not favored—no special standard in 1st A cases
ID	"Substantial grounds for difference of opinion." No special rules as to media
IL	Limited circumstances—"substantial grounds for difference of opinion."
IN	No special consideration in defamation cases
IW	Allowed where: 1. Ruling affects substantial rights 2. Ruling materially affects the final decision 3. Determination of correctness of ruling before trial will better serve the interests of justice.
KS	"Hostile" toward most interlocutory appeals
KY	Prohibited

Source: *Media Libel Law: 50-State Survey 2001-2002*, Libel Defense Resource Center, ed., 2001.

LA	By discretionary writ only---Frequent use in libel cases. *see eg.* 626 So.2d 345, 514 So.2d 118, 533 So.2d 344, 406 So.2d 185, 355 So.2d 879.
ME	Only final judgements appealable—exceptions track generally the Iowa rule
MD	No
MA	Disfavored-but may be granted by one justice of appeals court-leave granted in some libel cases. *see eg.* 369 N.E. 2d 996 (1979), 500 N.E.2d 794 (1986), 25 Med. L.Rptr. 1254, 1255 (1996).
MI	By leave only
MN	Appealable only if absolute immunity is asserted. *see* 552 N.W.2d 344 (Minn.Ct. App. 1994).
MS	Tracks Federal Statue
MO	No rule allowing interlocutory appeals of any kind
MT	Only if certified by lower court or if lower court exceeded its jurisdiction
NE	Not generally available for civil actions
NV	Only on a limited basis
NH	Only where conditions track Iowa rule
NJ	Discretionary; infrequently granted
NM	Only if trail court certifies the issue
NY	All interlocutory judgements are appealable as of right, subject to three limited exceptions CPLR § 5701
NC	Allowed, if it affects a substantial right of appellant
ND	No provision
OH	Denial of a motion for summary judgement is not a final appealable order. *See* 554 N.E. 2d 1292, cert. denied 111 S.CT. 428 (1990).
OK	Must be certified by trial judge and affect a substantial right
OR	Not available in civil actions, generally.
PA	By permission; or pursuant to the collateral order doctrine. Orders denying summary judgement not appealable as of right.
RI	Generally not permitted, except to prevent imminent and irreparable harm.

SC	**Appeal permitted from orders affecting a substantial right, when the order** **(a) determines the action** **(b) grants or refuses a new trial** **(c) strikes a pleading**
SD	**At the discretion of Supreme Court**
TN	**Available only upon certification by trial court, and permission of appellate court**
TX	**The statute in question in this case**
UT	**Rule 5 Utah Courts of Appeal. Interlocutory appeal allowed in one media case where defendant alleged absolute immunity 16 P.3d 1230, 1231 (Utah 2000)**
VT	**Discretionary. Trial court must certify the question, where:** **(a) a controlling question of law is presented** **(b) substantial ground for difference of opinion, and** **(c) immediate appeal may materially advance the end of the case.**
VA	**Only in certain chancery cases**
WA	**Allowed in some circumstances. WA. R. App. P. 2.3 Interlocutory appeal permitted in one libel case, where, "Superior court has committed an obvious error which would render further proceedings useless." 678 P.2d 1282 cert. denied 469 U.S. 1087 (1984).**
WV	**Not provided for**
WI	**Discretionary. None have been allowed in defamation cases.**
WY	**By writ of review, where:** **(a) controlling question of law** **(b) substantial bases for difference of opinion** **(c) appeal will materially advance resolution of the litigation**

New York State Consolidated Laws

Back | New York State Laws | Assembly Home

Civil Practice Law & Rules

ARTICLE 56
APPEALS TO THE COURT OF APPEALS

5601. Appeals to the court of appeals as of right.
(a) Dissent.
(b) Constitutional grounds.
(c) From order granting new trial or hearing, upon stipulation for judgment absolute.
(d) Based upon nonfinal determination of appellate division.
5602. Appeals to the court of appeals by permission.
(a) Permission of appellate division or court of appeals.
(b) Permission of appellate division.
5611. When appellate division order deemed final.
5612. Presumptions as to determinations of questions of fact.
(a) Appeal from reversal or modification.
(b) Appeal on certified questions of law.
5613. Disposition upon reversal or modification.
5614. Disposition upon certified questions.
5615. Disposition upon appeal from order granting new trial or hearing.

S 5601. Appeals to the court of appeals as of right. (a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final

determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

S 5602. Appeals to the court of appeals by permission. (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court, final determination of such agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award and the final judgment, determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

Sec. 5611. When appellate division order deemed final. If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. If the aggrieved party

is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his having performed it.

Sec. 5612. Presumptions as to determinations of questions of fact. (a) Appeal from reversal or modification. On an appeal from an order of the appellate division reversing, modifying or setting aside a determination and rendering a final or interlocutory determination, except when it reinstates a verdict, the court of appeals shall presume that questions of fact as to which no findings are made in the order or opinion of the appellate division were not considered by it, where such findings are required to be made by paragraph two of subdivision (b) of rule 5712.

(b) Appeal on certified questions of law. On an appeal on certified questions of law, the court of appeals shall presume that questions of fact as to which no findings are made in the order granting permission to appeal or in the order appealed from or in the opinion of the appellate div sion were determined in favor of the party who is respondent in the court of appeals.

Sec. 5613. Disposition upon reversal or modification. The court of appeals, upon reversing or modifying a determination of the appellate division, when it appears or must be presumed that questions of fact were not considered by the appellate division, shall remit the case to that court for determination of questions of fact raised in the appellate division.

Sec. 5614. Disposition upon certified questions. The order of the court of appeals determining an appeal upon certified questions shall certify its answers to the questions certified and direct entry of the appropriate judgment or order.

Sec. 5615. Disposition upon appeal from order granting new trial or hearing. When an appeal to the appellate division presented questions of fact and a further appeal is taken pursuant to subdivision (c) of section 5601, or subparagraph (iii) of paragraph two of subdivision (b) of section 5602, the court of appeals shall affirm the order appealed from and shall render judgment or order absolute against the appellant unless the order or opinion of the appellate division recites either that the questions of fact have not been considered or that the court has considered the questions of fact and has determined that it would not grant a new trial or hearing upon those questions.

New York State Consolidated Laws

Back | New York State Laws | Assembly Home

Civil Practice Law & Rules

ARTICLE 57
APPEALS TO THE APPELLATE DIVISION

5701. Appeals to appellate division from supreme and county courts.
(a) Appeals as of right.
(b) Orders not appealable as of right.
(c) Appeals by permission.
5702. Appeals to appellate division from other courts of original instance.
5703. Appeals to appellate division from appellate courts.
(a) From appellate terms.
(b) From other appellate courts.
5704. Review of ex parte orders.
(a) By appellate division.
(b) By appellate term.
5711. Where appeal heard.
5712. Content of order determining appeal.
(a) Dissents.
(b) Order of affirmance.
(c) Order of reversal or modification.
5713. Content of order granting permission to appeal to court of appeals.

S 5701. Appeals to appellate division from supreme and county courts.
(a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:

1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; or

2. from an order not specified in subdivision (b), where the motion it decided was made upon notice and it:

(i) grants, refuses, continues or modifies a provisional remedy; or

(ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or

(iii) grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or

(iv) involves some part of the merits; or

(v) affects a substantial right; or

(vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or

(vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision; or

(viii) grants a motion for leave to reargue made pursuant to subdivi-

sion (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221; or

3. from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.

(b) Orders not appealable as of right. An order is not appealable to the appellate division as of right where it:

1. is made in a proceeding against a body or officer pursuant to article 78; or

2. requires or refuses to require a more definite statement in a pleading; or 3. orders or refuses to order that scandalous or prejudicial matter be stricken from a pleading.

(c) Appeals by permission. An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court or a county court by permission of the judge who made the order granted before application to a justice of the appellate division; or by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application.

Sec. 5702. Appeals to appellate division from other courts of original instance. An appeal may be taken to the appellate division from any judgment or order of a court of original instance other than the supreme court or a county court in accordance with the statute governing practice in such court.

Sec. 5703. Appeals to appellate division from appellate courts. (a) From appellate terms. An appeal may be taken to the appellate division, from an order of the appellate term which determines an appeal from a judgment or order of a lower court, by permission of the appellate term or, in case of refusal, of the appellate division. When permission to appeal is sought from an order granting or affirming the granting of a new trial or hearing, the appellant shall stipulate that, upon affirmance, judgment absolute may be entered against him.

(b) From other appellate courts. An appeal may be taken to the appellate division as of right from an order of a county court or a special term of the supreme court which determines an appeal from a judgment of a lower court.

Sec. 5704. Review of ex parte orders. (a) By appellate division. The appellate division or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

(b) By appellate term. The appellate term in the first or second judicial department or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate term; and such appellate term may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate term.

Sec. 5711. Where appeal heard. Except as provided in subdivision (d) of rule 511, an appeal to the appellate division shall be brought in the department embracing the county in which the judgment or order appealed from is entered and there heard

and determined unless, in furtherance of justice, the appeal is sent to another department.

Sec. 5712. Content of order determining appeal. (a) Dissents. Every order of the appellate division determining an appeal shall state whether one or more justices dissent from the determination.

(b) Order of affirmance. Whenever the appellate division, although affirming a final or interlocutory judgment or order, reverses or modifies any findings of fact, or makes new findings of fact, its order shall comply with the requirements of subdivision (c).

(c) Order of reversal or modification. Whenever the appellate division reverses or modifies or sets aside a determination and thereupon makes a determination, except when it reinstates a verdict, its order shall state whether its determination is upon the law, or upon the facts, or upon the law and the facts:

1. if the determination is stated to be upon the law alone, the order shall also state whether or not the findings of fact below have been affirmed; and

2. if the determination is stated to be upon the facts, or upon the law and the facts, the order shall also specify the findings of fact which are reversed or modified, and set forth any new findings of fact made by the appellate division with such particularity as was employed for the statement of the findings of fact in the court of original instance; except that the order need not specify the findings of fact which are reversed or modified nor set forth any new findings of fact if the appeal is either from a determination by the court without any statement of the findings of fact or from a judgment entered upon a general verdict without answers to interrogatories.

Sec. 5713. Content of order granting permission to appeal to court of appeals. When the appellate division grants permission to appeal to the court of appeals, its order granting such permission shall state that questions of law have arisen which in its opinion ought to be reviewed. When the appeal is from a non-final order, the order granting such permission shall also state that the findings of fact have been affirmed, or reversed or modified and new findings of fact made, or have not been considered, shall specify the findings of fact which have been reversed or modified and set forth new findings of fact with at least the same particularity as was employed for the findings of fact below and shall certify the questions of law decisive of the correctness of its determination or of any separable portion of it.

ARKANSAS CODE OF 1987 ANNOTATED

COURT RULES

2001 Edition

Prepared by the Editorial Staff of the Publisher

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RULES OF APPELLATE PROCEDURE—CIVIL

Rule
1. Scope of rules.
2. Appealable matters; priority.
3. Appeal — How taken.
4. Appeal — When taken.
5. Record — Time for filing.
6. Record on appeal.
7. Certification and transmission of record.
8. Stay pending appeal.
9. Time extension when last day for action falls on Saturday, Sunday or holiday.
10. Uniform paper size.
11. Certification by parties and attorneys; frivolous appeals; sanctions.

Publisher's Notes. The Per Curiam dated July 10, 1995, provided, in part: "We hereby adopt the Revised Rules of Appellate Procedure, to be effective on January 1, 1996."

Rule 1. Scope of rules.

These rules shall govern the procedure in civil appeals to the Arkansas Supreme Court or Court of Appeals. Whenever the words Supreme Court appear in these rules, the words Court of Appeals shall be substituted in applying the rules in a case in which jurisdiction of the appeal is in the Court of Appeals under Rule 1-2 of the Rules of the Supreme Court and Court of Appeals. (Amended May 5, 1980; adopted and amended by Per Curiam dated July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 1 (1994): This rule is a slightly modified version of former Appellate Rule 1. The word "civil" has been added to the first sentence to make clear that these rules apply only to appeals in civil cases. The Reporter's Notes prepared in connection with former Appellate Rule 1 are set out below.

Reporter's Notes to Rule 1: 1. This rule makes it clear that these rules apply only to appeals to the Arkansas Supreme Court. They have no applicability to appeals from municipal, county, small claims courts, etc.

2. The Committee did not deem it necessary to draft comprehensive rules dealing with the procedure after the Arkansas Supreme Court has acquired jurisdiction of a particular case. The Supreme Court has periodically revised its own rules with the result that little or no change is necessary at that level. These appellate rules are basically a revision and condensation of prior Arkansas statutory law as it affected procedures prior to the time the Supreme Court acquired jurisdiction. Thus, these rules are much less comprehensive than the federal appellate rules.

Publisher's Notes. The Per Curiam orders of the Supreme Court entered on December 18, 1978, adopting the Rules of Civil Procedure, the Rules of Appellate Procedure and the Rules of Inferior Courts, read: "PER CURIAM. The Court, pursuant to Act 38 of 1973 and to its constitutional and inherent power to regulate procedure in the courts, hereby adopts the Rules of Civil Procedure submitted by the Civil Procedure Revision Committee, with modifications made by the Court. These Rules will be effective July 1, 1979. The court expresses its great appreciation for the untiring work done by the members of the Committee and for the various suggestions made by attorneys in response to the Court's invitation."

CASE NOTES

Preemption by Special Statutes.

The Rules of Appellate Procedure are broad and general in their scope while § 11-9-711 may be characterized as a special statute governing appeals only in workers' compensation cases; in such cases, the special statute was intended to remain in force as an exception to the latter and more general enact-

ment. Sunbelt Couriers v. McCartney, 31 Ark. App. 8, 786 S.W.2d 121, aff'd, 303 Ark. 522, 798 S.W.2d 92 (1990).

Cited: Morgan v. National Pizza Co., 285 Ark. 61, 684 S.W.2d 812 (1985); Saber Mfg. Co. v. Thompson, 286 Ark. 150, 689 S.W.2d 567 (1985).

Rule 2. Appealable matters; priority.

(a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:

1. A final judgment or decree entered by the trial court;

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;

3. An order which grants or refuses a new trial;

4. An order which strikes out an answer, or any part of an answer, or any pleading in an action;

5. An order which vacates or sustains an attachment or garnishment;

6. An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused;

7. An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder;

8. An order which disqualifies an attorney from further participation in the case;

9. An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure;

10. An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;

11. An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the trial court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties, has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure; and

12. An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all probate court orders, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator).

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

(c) All appeals from juvenile court shall be made in the same time and manner provided for appeals from chancery court.

(1) In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

(2) Pending an appeal from any case involving a juvenile out-of-home placement, the juvenile court retains jurisdiction to conduct review hearings.

(3) In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. Rule 54(b); and

(C) termination of parental rights.

(d) All final orders awarding custody are final appealable orders.

(e) Appeals in criminal cases have priority over all other business. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence. (Amended by Per Curiam July 12, 1982; amended by Per Curiam March 18, 1985; amended by Per Curiam November 11, 1991, effective January 1, 1992; amended by Per Curiam dated November 8, 1993, effective January 1, 1994; adopted and amended by Per Curiam dated July 10, 1995, effective January 1, 1996; adopted and amended by Per Curiam effective March 4, 1999; amended by Per Curium January 27, 2000; amended by Per Curiam February 1, 2001.)

Reporter's Notes to Rule 2 (1995): This rule is virtually identical to former Appellate Rule 2, although the title has been changed to more accurately reflect its content. Subdivision (c) has been modified to expressly include the statement that criminal appeals take precedence in the Supreme Court, as was the case under former Rule 36.2 of the Rules of Criminal Procedure. The Reporter's Notes prepared in connection with former Appellate Rule 2 are set out below.

Reporter's Notes to Rule 2: 1. Act 38 of 1973, authorizing the Supreme Court to prescribe rules of civil procedure, provides that rights of appeal shall continue as authorized by law. Accordingly, in this rule the Court has preserved rights of appeal as conferred by superseded Ark. Stat. Ann. § 27-2101 (Supp. 1971), superseded § 27-2102 (Repl. 1962), and superseded § 31-165 (Repl. 1962). If, at the effective date of these rules, there are other statutes conferring rights of appeal from trial courts, they are not intended to be superseded.

2. An order dismissing a writ of garnishment is appealable. *Bank of Eudora v. Ross*, 168 Ark. 754, 271 S.W. 703 (1925).

Addition to Reporter's Notes, 1985 Amendment: Subsection (9) is added to Rule 2(a) to permit appeal to the Supreme Court of an order certifying a case as a class action under Rule 23, Ark. R. Civ. P. *See Ford Motor Credit Co. v. Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985). The Supreme Court has previously held that an order denying class certification is appealable under Rule 2. *Drew v. First Federal Savings & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981). In contrast, neither type of order is immediately appealable in the federal courts. *See Coopers & Lybrand v. Livesay*, 437 U.S. 473 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

Addition to Reporter's Notes, 1991 Amendment: Rule 2(a)(9) is amended to expressly permit an immediate appeal from any order denying a motion to certify a case as a class action, as well as from an order granting such certification. The Supreme Court has held that both types of orders may be immediately appealed. *See Ford Motor Credit Co. v. Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985); *Drew v. First Federal Savings & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981). However, Rule 2(a)(9) has heretofore specifically dealt only with orders granting class certification. Rule 2(c) is amended to add appeals under Rule 2(a)(9) to the list of those that "take precedence," since appeals of orders granting or denying class certification are interlocutory in nature.

Addition to Reporter's Notes, 1999 Amendment: The Supreme Court added subdivisions (c) and (d) to Rule 2 in 1999 and redesignated former subdivision (c) as (e). Also, appeals under subdivisions (c)(3) and (d) were added to the list of civil cases that "take precedence" in the appellate court. These changes were recommended by an ad hoc committee on foster care and adoption. *See* In re Rules of Appellate Procedure—Civil, Rule 2, 336 Ark. Appx. (1999).

Addition to Reporter's Notes, 2000 Amendment: Three changes, all of which

restate present law, have been made in Rule 2(a). New paragraph 10 provides that an immediate appeal lies from an order "denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official." This provision is a codification of case law. *See, e.g.,Ozarks Unlimited Resources Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998); *Newton v. Ethoch*, 332 Ark. 325, 965 S.W.2d 96 (1998); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

New paragraph 11 is a restatement of Rule 54(b) of the Arkansas Rules of Civil Procedure. Because noncompliance with Rule 54(b) continues to be a problem, this provision was added as a reminder to counsel. New paragraph 12 reflects the Supreme Court's holding that Rule 2(a) preserves all statutory rights of appeal in existence as of July 1, 1979, the effective date of the Rules of Appellate Procedure. *See Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994); *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994). The original Reporter's Note to Rule 2 contains a statement to that effect, but the Committee on Civil Practice deemed it desirable to include specific language in the text of the rule. Paragraph 12 also includes two examples of statutes that fall within its scope.

Addition to Reporter's Notes, 2001 Amendment: Paragraph 11 of subdivision (a) has been amended to reflect the certificate now required by Rule 54(b) of the Rules of Civil Procedure.

RESEARCH REFERENCES

Ark. L. Rev. Notes, The Free Press-Fair Trial Controversy: A New Standard for Closure Motions in Criminal Proceedings, 38 Ark. L. Rev. 403.

Ford Motor Credit Co. v. Nesheim: Appealability of Class Orders in Arkansas, 40 Ark. L. Rev. 165.

Note, How a State's Interests in a Child's Welfare Are Frustrated by Indiscriminate Application of the Final Judgment Rule: Arkansas Department of Human Services v. Lopez, 44 Ark. L. Rev. 895.

Note, Waiver and the Special Appearance in Arkansas: Arkansas Department of Human Services v. Farris, 47 Ark. L. Rev. 883.

UALR L.J. Survey of Arkansas Law, Miscellaneous, 6 UALR L.J. 187.

Arkansas Law Survey, Price, Civil Procedure, 9 UALR L.J. 91.

CASE NOTES

ANALYSIS

In general.
Construction.
Purpose.
Applicability.
Appealable order.
—Determination.
—Foreclosure.
—Scope of review.
Attachment or garnishment.
Class actions.
Contempt.
Denial of default judgment.
Denial of motion to dismiss.
Denial of summary judgment.
Disqualification.
Finality of judgment.
Interlocutory decisions.
Jurisdiction.
Multiple orders.
Multiple parties or claims.
Non-appealable order.
Notice.
Standing.
Summary judgment.
Workers' compensation commission.

In General.

This rule preserved all statutory rights of appeal that were in existence at the effective date of the rules, July 1, 1979. American Ins. Co. v. Cazort, 316 Ark. 314, 871 S.W.2d 575 (1994).

This rule preserves the statutory rights of appeal which were in existence at the effective date of the appellate rules, including those granted under § 28-1-116. In re Vesa, 319 Ark. 574, 892 S.W.2d 491 (1995).

Construction.

The specific provision for appeal when an answer is stricken under subsection (a)(4) must control over the general provisions contained in subsection (a)(1) and ARCP 54(b). Arnold Fireworks Display, Inc. v. Schmidt, 307 Ark. 316, 820 S.W.2d 444 (1991).

The appealability of orders is governed by this rule and not by S. Ct. & Ct. App. Rule 1-2. American Ins. Co. v. Cazort, 316 Ark. 314, 871 S.W.2d 575 (1994).

Under Const. Amend. 58, which created the court of appeals, the Supreme Court, by rule, decides which court will have primary jurisdiction of appeals after an appeal has been validly lodged; S. Ct. & Ct. App. Rule 1-2 addresses that division of appellate jurisdiction and does not address the appealability of

orders. American Ins. Co. v. Cazort, 316 Ark. 314, 871 S.W.2d 575 (1994).

Subdivision (a)6 of this rule, providing for appeals from injunctions, represents an exception to ARCP 54(b), which requires that all claims relating to all parties be disposed of prefatory to appeal; the specific authority for an appeal from an injunction should control over the absence of finality in the court's order. East Poinsett County Sch. Dist. No. 14 v. Massey, 317 Ark. 219, 876 S.W.2d 573 (1994).

Purpose.

The purpose of this rule is to avoid piecemeal litigation. Lamb v. JFM, Inc., 311 Ark. 89, 842 S.W.2d 10 (1992).

Applicability.

This Rule applies to appeals from the Workers' Compensation Commission. Samuels Hide & Metal Co. v. Griffin, 23 Ark. App. 3, 739 S.W.2d 698 (1987); Hernandez v. Simmons Indus., 25 Ark. App. 25, 752 S.W.2d 45 (1988); Banquet Foods v. McGlothin, 26 Ark. App. 130, 760 S.W.2d 880 (1988); Mid-State Constr. v. Sealy, 26 Ark. App. 186, 761 S.W.2d 951 (1988); Baldor Elec. Co. v. Jones, 29 Ark. App. 80, 777 S.W.2d 586 (1989).

The Rules of Appellate Procedure govern appeals from circuit, chancery, and probate courts; and were not intended to apply to appeals from state agencies. Sunbelt Couriers v. McCartney, 303 Ark. 522, 798 S.W.2d 92 (1990).

When the Supreme Court promulgated this rule, it did not intend to alter the statutory rights of appeal that were then in existence; for example, the Uniform Arbitration Act and its section on appeals, § 16-108-219, were enacted in 1969 and were in existence at the time this rule was promulgated, thus, a party would have a right of appeal, under this rule, from an order denying a motion to compel arbitration. American Ins. Co. v. Cazort, 316 Ark. 314, 871 S.W.2d 575 (1994).

Section 28-1-116 provides for appeals from probate causes involving wills, estates, and fiduciary relationships; it was enacted in 1949 and was in effect at the time this rule was adopted and, therefore, determines whether there is a right of appeal in a case involving orders of the probate court. Pickens v. Black, 316 Ark. 499, 872 S.W.2d 405 (1994).

Appealable Order.

An order disqualifying counsel is appealable. Herron v. Jones, 276 Ark. 493, 637 S.W.2d 569 (1982).

An order setting aside the judgment against a garnishee was appealable to the Supreme Court only because the appeal involved the interpretation or construction of § 16-58-125, which establishes the requirements for services of process upon a corporate agent at a branch office. Morgan v. National Pizza Co., 285 Ark. 61, 684 S.W.2d 812 (1985).

The order of a trial court certifying a case as a class action under ARCP 23 was a final or appealable order as defined in this rule following the Supreme Court's amendment of this rule to permit an appeal from an order certifying a case as a class action. Ford Motor Credit Co. v. Nesheim, 285 Ark. 253, 686 S.W.2d 777 (1985); Pledger v. Bosnick, 306 Ark. 45, 811 S.W.2d 286 (1991), cert. denied, 509 U.S. 921, 113 S. Ct. 3034, 125 L. Ed. 2d 721 (1993).

The order, which denied the appellant's motion to modify, set aside, and vacate the writ of mandamus, ordered that the sale of the property, under levy of execution, proceed; this order was within the ambit of this rule. Smith v. Flash TV Sales & Serv., Inc., 17 Ark. App. 185, 706 S.W.2d 184 (1986).

An appeal was properly taken from an interlocutory order compelling the appellants to comply with discovery of financial data concerning a church, because if appellants complied with the discovery order and the trial court concluded after the trial that appellees were not entitled to the information they sought, appellants could not be placed in their former condition. Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986).

An appeal from any final order also brings up for review any intermediate order involving the merits. Hayden v. Hayden, 291 Ark. 582, 726 S.W.2d 287 (1987).

For an order of a trial court to be appealable, it must be an order which in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. Associates Fin. Servs. Co. v. Crawford County Mem. Hosp., 297 Ark. 14, 759 S.W.2d 210 (1988).

Subsection (a)(4) authorizes an appeal when an answer has been stricken, even if it is not a final judgment. Arnold Fireworks Display, Inc. v. Schmidt, 307 Ark. 316, 820 S.W.2d 444 (1991).

Order which recited that the chancery court lacked personal jurisdiction and that any petition for termination of parental rights would have to be filed in another state, decisively concluded the right to file for termination of parental rights in Arkansas and was, therefore, final and appealable. Arkansas Dep't of Human Servs. v. Farris, 309 Ark. 575, 832 S.W.2d 482 (1992).

The denial of an intervention of right based on a claimed interest in the litigation which may be unprotected constitutes an appealable order under subdivision (a)(2) of this rule. Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n, 310 Ark. 597, 839 S.W.2d 187 (1992).

An order vacating a judgment within ninety days is not an appealable order because it is

not a final order dismissing the parties from the action, but an order vacating a judgment after ninety days is an appealable order because it is the equivalent of an order in an independent action setting aside the judgment. Lamb v. JFM, Inc., 311 Ark. 89, 842 S.W.2d 10 (1992).

An order granting or refusing a new trial is appealable. Mikkelson v. Willis, 38 Ark. App. 33, 826 S.W.2d 830 (1992).

A decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under ARAP 2(a)1. When there is such an order, a certification under ARCP 54(b) is not necessary. Alberty v. Wideman, 312 Ark. 434, 850 S.W.2d 314 (1993).

An order dismissing a complaint with prejudice is a final and appealable order. Hubbard v. Shores Group, Inc., 313 Ark. 498, 855 S.W.2d 924 (1993).

A decree foreclosing a mortgage and a later decree confirming the foreclosure sale were both final and appealable orders. Scherz v. Mundaca Inv. Corp., 318 Ark. 595, 886 S.W.2d 631 (1994).

A decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under subdivision (a)(1) of this rule; when there is such an order, a certification under ARCP 54(b) is not necessary. Scherz v. Mundaca Inv. Corp., 318 Ark. 595, 886 S.W.2d 631 (1994).

For an order to be appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy; the order must be of such a nature as to not only decide the rights of the parties, but to put the court's directive into execution, ending the litigation or a separable part of it. Doe v. Union Pac. R.R., 323 Ark. 237, 914 S.W.2d 312 (1996).

For an order to be appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. Petrus v. Nature Conservancy, 330 Ark. 722, 957 S.W.2d 688 (1997).

Because the defendant government officials contended that they were immune from suit, as opposed to being immune solely from liability, the denial of their motion to dismiss on immunity grounds was an appealable order. Heigle v. Miller, 332 Ark. 315, 965 S.W.2d 116 (1998).

Although there is no need for the certification of a class in an action brought under ARCP Rule 23.2, where there was an apparent attempt on the part of the parties and the trial court to provide a notice under ARCP Rule 23, an order denying a motion to dismiss and overruling objections to the "class certification" would be deemed appealable. Arkansas County Farm Bureau v. McKinney, 334 Ark. 582, 976 S.W.2d 945 (1998).

The appellate court could not reach the question of whether a county court improperly declined to exercise jurisdiction in a child custody matter where (1) following a telephone conference between a Colorado district court and a county chancery court, the county chancery court reportedly declined to exercise jurisdiction and the Colorado court retained jurisdiction, but (2) the only order presented for review was an order of the Colorado district court and the county chancery court entered no order in the matter. Mallard v. Mallard, — Ark. App. —, — S.W.3d —, 2000 Ark. App. LEXIS 317 (April 19, 2000).

—Determination.

The test of finality and appealability of an order is not whether the order settles the issue as a question of law, but to be final the order must also put the court's directive into execution, ending the litigation or a separable branch of it. Scaff v. Scaff, 5 Ark. App. 300, 635 S.W.2d 292 (1982).

For a chancellor's order to be appealable, it must in some way determine or discontinue the action; the final order must put the chancellor's directive into execution, ending the litigation or at least a separable portion of it. Morgan v. Morgan, 8 Ark. App. 346, 652 S.W.2d 57 (1983).

The test of the finality and appealability of an order is not whether the order settles the issue as a question of law, but whether it also puts the court's directive into execution, ending the litigation or a separable branch of it; an order is appealable if it would divest a substantial right in such a way as to put it beyond the power of the court to place the party in the party's former condition. Smith v. Flash TV Sales & Serv., Inc., 17 Ark. App. 185, 706 S.W.2d 184 (1986).

Even though the parties do not raise the issue of the appealability of an order, it is the duty of the appellate court to determine whether or not it has jurisdiction. Associates Fin. Servs. Co. v. Crawford County Mem. Hosp., 297 Ark. 14, 759 S.W.2d 210 (1988).

—Foreclosure.

A decree granting foreclosure is a separate, final, and appealable order, and a notice of appeal must be taken within 30 days from the date that order is entered. McAdams v. Automotive Rentals, Inc., 319 Ark. 254, 891 S.W.2d 52, cert. denied, 516 U.S. 844, 116 S. Ct. 132, 133 L. Ed. 2d 80 (1995).

—Scope of Review.

In deciding an appeal when an answer has been stricken, the Supreme Court should rule on all the issues dependent upon the stricken answer; conversely, the court need only to address those matters that are related to the striking of the answer. Arnold & Arnold v.

Williams, 315 Ark. 632, 870 S.W.2d 365, cert. denied, 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 400 (1994).

Attachment or Garnishment.

Under subdivision (a)(5), there must be an order vacating or sustaining a garnishment; an order denying a motion for summary judgment is not appealable under this rule. Medical & Dental Credit Bureau, Inc. v. Lake Hamilton Camp & Conference Grounds, 291 Ark. 353, 727 S.W.2d 382 (1987).

Class Actions.

Issues may not be presented, under the guise of an appeal of a class certification, other than those issues concerning compliance with ARCP 23. Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14, 298 Ark. 603, 769 S.W.2d 419 (1989).

Where the appellant appealed from class certification but raised only issues of sovereign immunity and standing to sue, the appeal was dismissed because issues were not proper ones to be raised pursuant to subsection (a). Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14, 298 Ark. 603, 769 S.W.2d 419 (1989).

Contempt.

While a finding of a contempt is appealable because it constitutes a final disposition of the contempt matter as between the appellant and the court, where no sanctions are imposed, and there is not merely a postponement of a sanction but a complete remission of the contempt, there is no basis for appellate relief on the contempt issue. Taylor v. Taylor, 26 Ark. App. 31, 759 S.W.2d 222 (1988).

An order of contempt is a final, appealable order. Young v. Young, 316 Ark. 456, 872 S.W.2d 856 (1994).

Denial of Default Judgment.

The trial judge's order denying a motion for default judgment and providing that the case should proceed to trial on its merits, was not appealable since such ruling did not "dismiss the parties from the Court, discharge them from the action or conclude their rights to the subject matter in controversy." DeClerk v. Tribble, 269 Ark. 572, 599 S.W.2d 152 (1980).

An order setting aside a default judgment, which ordinarily is not appealable because it is not final, becomes appealable when it is entered more than 90 days after the entry of the default judgment. Cigna Ins. Co. v. Brisson, 294 Ark. 504, 744 S.W.2d 716 (1988).

Refusal to set aside a default judgment as to liability is not a final judgment as required for appeal. The issue of damages remains to be tried before there can be a final order. Sevenprop Assocs. v. Harrison, 295 Ark. 35, 746 S.W.2d 51 (1988).

The denial of a motion for a default judgment is not a final order. Associates Fin. Servs. Co. v. Crawford County Mem. Hosp., 297 Ark. 14, 759 S.W.2d 210 (1988).

Denial of Motion to Dismiss.

The denial of a motion to dismiss an action is not a final judgment from which an appeal may be taken; the only matter disposed of by the order is that the case should proceed to trial, and those matters put in issue are not lost by continuing through a trial of the matter. Epperson v. Biggs, 17 Ark. App. 212, 705 S.W.2d 901 (1986); Cigna Ins. Co. v. Brisson, 294 Ark. 504, 744 S.W.2d 716 (1988).

Denial of Summary Judgment.

A denial of a summary judgment is deemed an interlocutory order and not a final order from which appeal may be taken. Danco Constr. Co. v. City of Fort Smith, 268 Ark. 1053, 598 S.W.2d 437 (1980); Medical & Dental Credit Bureau, Inc. v. Lake Hamilton Camp & Conference Grounds, 291 Ark. 353, 727 S.W.2d 382 (1987).

Denial of a summary judgment motion is not a final, appealable order. Jaggers v. Zolliecoffer, 290 Ark. 250, 718 S.W.2d 441 (1986); Malone & Hyde, Inc. v. West & Co., 300 Ark. 435, 780 S.W.2d 13 (1989); Sutter v. King, 310 Ark. 681, 839 S.W.2d 218 (1992).

Generally a denial of a motion for summary judgment is a nonappealable order. However, the general rule does not apply in cases where, under subdivision (a)(2), the refusal to grant the summary judgment motion has the effect of determining that the appellants are not entitled to immunity from suit, as the right of qualified immunity from suit is effectively lost if a case is permitted to go to trial. Robinson v. Beaumont, 291 Ark. 477, 725 S.W.2d 839 (1987).

Disqualification.

Subdivision (a)8 of this rule had its genesis in a 1982 case where a motion was made by one party to disqualify counsel of the opposing party for violation of the Code of Professional Responsibility. Price v. State, 313 Ark. 96, 852 S.W.2d 107 (1993).

Where the trial judge, on his own motion, simply removed court-appointed counsel for purposes of the appeal, leaving the public defender to represent defendant, the removal was not a disqualification initially raised by opposing counsel on ethical grounds under subdivision (a)8 of this rule and, hence, did not constitute an appealable order under this rule. Price v. State, 313 Ark. 96, 852 S.W.2d 107 (1993).

"Disqualify" is defined as "to divest or deprive of qualification; to incapacitate" or "to render ineligible or unfit." Brenk v. State, 316 Ark. 249, 871 S.W.2d 372 (1994).

Where one of two court appointed attorneys was removed from representing defendant in his second trial for murder, but the attorney was not disqualified from further participa-

tion, was not prohibited from participating, and in fact was specifically granted permission to continue to participate in defendant's retrial at his own expense, the order of removal was not an order of disqualification under subdivision (a)8 of this rule. Brenk v. State, 316 Ark. 249, 871 S.W.2d 372 (1994).

An order denying a motion to disqualify adversary's counsel in a civil proceeding is not an appealable final order. Clark v. Clark, 319 Ark. 193, 890 S.W.2d 267 (1995).

Finality of Judgment.

In order for a judgment to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. Roy v. International Multifoods Corp., 268 Ark. 958, 597 S.W.2d 129 (1980); Hyatt v. City of Bentonville, 275 Ark. 210, 628 S.W.2d 326 (1982); McIlroy Bank & Trust v. Zuber, 275 Ark. 345, 629 S.W.2d 304 (1982); Roberts Enters., Inc. v. Arkansas State Hwy. Comm'n, 277 Ark. 25, 638 S.W.2d 675 (1982); Corning Bank v. Delta Rice Mills, Inc., 281 Ark. 342, 663 S.W.2d 737 (1984); Fratesi v. Bond, 282 Ark. 213, 666 S.W.2d 712 (1984); Tapp v. Fowler, 288 Ark. 70, 702 S.W.2d 17 (1986); Epperson v. Biggs, 17 Ark. App. 212, 705 S.W.2d 901 (1986); Elardo v. Taylor, 291 Ark. 503, 726 S.W.2d 1 (1987); Samuels Hide & Metal Co. v. Griffin, 23 Ark. App. 3, 739 S.W.2d 698 (1987); Cigna Ins. Co. v. Brisson, 294 Ark. 504, 744 S.W.2d 716 (1988); Sevenprop Assocs. v. Harrison, 295 Ark. 35, 746 S.W.2d 51 (1988); Wilburn v. Keenan Cos., 297 Ark. 74, 759 S.W.2d 554 (1988); Hernandez v. Simmons Indus., 25 Ark. App. 25, 752 S.W.2d 45 (1988); Estate of Hastings v. Planters & Stockmen Bank, 296 Ark. 409, 757 S.W.2d 546 (1988); Taylor v. Taylor, 26 Ark. App. 31, 759 S.W.2d 222 (1988); Banquet Foods v. McGlothin, 26 Ark. App. 130, 760 S.W.2d 880 (1988); Mid-State Constr. v. Sealy, 26 Ark. App. 186, 761 S.W.2d 951 (1988); Malone & Hyde, Inc. v. West & Co., 300 Ark. 435, 780 S.W.2d 13 (1989); Arkansas Dep't of Human Servs. v. Lopez, 302 Ark. 154, 787 S.W.2d 686 (1990); Arkansas Dep't of Human Servs. v. Farris, 309 Ark. 575, 832 S.W.2d 482 (1992); Kelly v. Kelly, 310 Ark. 244, 835 S.W.2d 869 (1992).

Where a circuit judge issued an order which denied the defendant's motions to declare a settlement and to dismiss the action, such an order was not a "final judgment" from which an appeal would lie under this rule. Roy v. International Multifoods Corp., 268 Ark. 958, 597 S.W.2d 129 (1980); Hyatt v. City of Bentonville, 275 Ark. 210, 628 S.W.2d 326 (1982).

The denial of a motion to dismiss an action is not a final judgment from which an appeal will lie. Roberts Enters., Inc. v. Arkansas State Hwy. Comm'n, 277 Ark. 25, 638 S.W.2d 675 (1982).

The Supreme Court will not reach the merits of an appeal if the order appealed is not final. Corning Bank v. Delta Rice Mills, Inc., 281 Ark. 342, 663 S.W.2d 737 (1984); Fratesi v. Bond, 282 Ark. 213, 666 S.W.2d 712 (1984); Kilgore v. Viner, 293 Ark. 187, 736 S.W.2d 1 (1987); Sevenprop Assocs. v. Harrison, 295 Ark. 35, 746 S.W.2d 51 (1988); Wilburn v. Keenan Cos., 297 Ark. 74, 759 S.W.2d 554 (1988).

The rule that an order must be final to be appealable is a jurisdictional requirement which the court is obliged to raise even when the parties do not. Fratesi v. Bond, 282 Ark. 213, 666 S.W.2d 712 (1984); Mid-State Homes, Inc. v. Beverly, 20 Ark. App. 213, 727 S.W.2d 142 (1987); Wilburn v. Keenan Cos., 297 Ark. 74, 759 S.W.2d 554 (1988).

Where the trial court did not grant summary judgment in the whole case but merely on the issue of punitive damages, such judgment was not final and appealable. Fratesi v. Bond, 282 Ark. 213, 666 S.W.2d 712 (1984).

To be final, an order must be of such a nature as to not only decide the rights of the parties, but also to put the court's directive into execution, ending the litigation or a separable part of it. Mid-State Homes, Inc. v. Beverly, 20 Ark. App. 213, 727 S.W.2d 142 (1987); Bonner v. Sikes, 20 Ark. App. 209, 727 S.W.2d 144 (1987); Harper v. Harper, 21 Ark. App. 255, 731 S.W.2d 241 (1987); Kilgore v. Viner, 293 Ark. 187, 736 S.W.2d 1 (1987).

A judgment is the final determination of the rights of parties in an action; the amount of the judgment must be computed, as near as may be, in dollars and cents; and the judgment must specify clearly the relief granted or other determination of the action. A final judgment or decision is one that finally adjudicated the rights of the parties, putting it beyond the power of the court which made it to place the parties in their original positions; it must be such a final determination as may be enforced by execution or in some other appropriate manner. Estate of Hastings v. Planters & Stockmen Bank, 296 Ark. 409, 757 S.W.2d 546 (1988).

Before an order for a judicial sale places the court's directive into execution, the chancellor must appoint a commissioner and set a day and place for the sale, and, perhaps, set an attorney's fee. Alberty v. Wideman, 312 Ark. 434, 850 S.W.2d 314 (1993).

A chancellor's ruling, which provided for alternative resolutions of the dispute, was final for purposes of appeal, since it addressed every issue presented by the parties, and reserved no issues for later determination. Chambers v. Manning, 315 Ark. 369, 868 S.W.2d 64 (1993).

Where the chancellor failed to appropriately treat two counterclaims, as well as a cross-complaint, the appeal was dismissed as not final, pursuant to ARCP 54(b) and subsection 2(a) of this rule. Maroney v. City of Malvern, 317 Ark. 177, 876 S.W.2d 585 (1994).

Although the ruling on a motion treated as one to intervene came after the final judgment, it was a part of the litigation which resulted in that final determination and was a part of the judgment; thus, it was final and appealable pursuant to subdivision (a)1 of this rule. Arkansas Best Corp. v. General Elec. Capital Corp., 317 Ark. 238, 878 S.W.2d 708 (1994).

Even though an issue on which a court renders a decision might be an important one, an appeal will be premature if the decision does not, from a practical standpoint, conclude the merits of the case. Doe v. Union Pac. R.R., 323 Ark. 237, 914 S.W.2d 312 (1996).

Where the trial court did not give a directive that a final judgment be entered but only granted partial summary judgment, the judgment lacked finality and thus was not appealable. French v. Brooks Sports Ctr., Inc., 57 Ark. App. 30, 940 S.W.2d 507 (1997).

An order in a divorce proceeding that required the parties to cooperate in procedures to determine the paternity of the wife's child and that further required the husband to pay child support pending such determination was not a final order in that it left open the issue of the child's paternity, notwithstanding that both parties orally stated that the husband was the child's father. Smith v. Smith, 337 Ark. 583, 990 S.W.2d 550 (1999).

An order awarding costs did not constitute a final order within the meaning of subsections (a)(1) or (a)(2) of this rule. Warren v. Kelso, 339 Ark. 70, 3 S.W.3d 302 (1999).

There was no final appealable judgment in an action pertaining to an alleged agreement for the purchase of real property where the chancellor failed to appropriately dispose of a third-party defendant counterclaim. Mitchell v. Headley, — Ark. App. —, — S.W.3d —, 2000 Ark. App. LEXIS 381 (May 17, 2000).

There was no final appealable order in an action for fraud where the trial court dismissed the action against one defendant on the basis of res judicata, but did not dispose of the claims against the other defendants. Pettus v. Holcomb, — Ark. App. —, — S.W.3d —, 2000 Ark. App. LEXIS 405 (May 10, 2000).

There was no appealable final judgment in a paternity action where the order appealed from determined paternity and awarded child support, but reserved the issues of lying-in, medical expenses, and retroactive support. Cole v. Moten, — Ark. App. —, — S.W.3d —, 2000 Ark. App. LEXIS 406 (May 10, 2000).

There was no final appealable order where the court granted summary judgment to the named defendants, but did not dispose of claims against 10 John Doe defendants. Boatmen's Trust Co. v. Housing Auth., — Ark. App. —, — S.W.3d —, 2000 Ark. App. LEXIS 348 (May 3, 2000).

There was no final appealable order in a wrongful death and personal injury action where the court granted summary judgment to the remaining named defendant, but made no disposition of claims against several John Doe defendants. Tackett v. Merchant's Sec. Patrol, — Ark. App. —, — S.W.3d —, 2000 Ark. App. LEXIS 367 (April 26, 2000).

A decree of divorce was not a final appealable order where it did not conclude the parties' property rights in respect to a number of issues, dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. Roberts v. Roberts, 70 Ark. App. 94, 14 S.W.3d 529 (2000).

Where a plaintiff has exercised his absolute right to voluntarily dismiss his claim, the first dismissal is without prejudice and is not an adjudication on the merits. Beverly Enterprises--Arkansas, Inc. v. Hillier, 341 Ark. 1, 14 S.W.3d 487 (2000).

In an action seeking an equitable one-half interest in certain real property and requesting an order directing partition of the real property and a division of proceeds between the parties, a decree finding that the real property was the property of a partnership between the parties and finding that the plaintiff was entitled to a credit should the property ever be sold was not a final appealable order as it failed to grant or deny the requested relief of partition. Rigsby v. Rigsby, 340 Ark. 544, 11 S.W.3d 551 (2000).

An order granting summary judgment was a final order for purposes of appeal, notwithstanding that the order also awarded attorney's fees, but did not set an amount and required the movant to submit an affidavit of attorney's fees along with a proposed precedent on the issue of attorney's fees to the court within seven days. Harold Ives Trucking Co. v. Pro Transp., Inc., 341 Ark. 735, 19 S.W.3d 600 (2000).

Interlocutory Decisions.

Interlocutory decisions and decisions on incidental matters are not reviewable for lack of finality. Banquet Foods v. McGlothin, 26 Ark. App. 130, 760 S.W.2d 880 (1988); Mid-State Constr. v. Sealy, 26 Ark. App. 186, 761 S.W.2d 951 (1988).

Interlocutory court order was intended to aid in determining issues raised in the complaint, was not an injunction, and was not appealable under subdivision (a)(6). Tate v. Sharpe, 300 Ark. 126, 777 S.W.2d 215 (1989).

The fact that a significant issue may be involved is not sufficient, in itself, for the

Supreme Court U.S.
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No. 01-1818

In The Supreme Court of the United States

ANGEL SANTIAGO,

Petitioner,

v.

K-SIX TELEVISION, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner has properly invoked this Court's jurisdiction to pass on the constitutionality of a Texas statute when petitioner never presented the federal claims to any Texas state court for determination?

2. Whether the United States Constitution prohibits the State of Texas from enacting a civil statute that permits media defendants and individuals whose comments are published in the media to file an interlocutory appeal of the denial of a motion for summary judgment in a defamation action?

RULE 14.1 AND RULE 29.6 STATEMENT

The petition correctly lists the parties in the underlying appeal.

Pursuant to Supreme Court Rule 29.6, respondent K-Six Television, Inc. states that it has no parent company, and no publicly held company owns 10% or more of its stock. Pursuant to a stock purchase transaction in June, 2002, all of its stock was purchased by Eagle Creek Broadcasting, L.L.C.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1 AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	2
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997).....3, 4, 5

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987).....4, 5

Calder v. Jones, 465 U.S. 783 (1984).....5, 6, 7

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)..... 6

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993)..... 6

K-Six Television, Inc. v. Santiago, 75 S.W.3d 91 (Tex. App.-San Antonio 2002, no pet.) 1

KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779 (Tex. App.-Houston [1st Dist.] 1999, writ denied)..... 6

STATUTES

Texas Civil Practice & Remedies Code §51.014(a)(6).....1, 2, 4, 6

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents K-Six Television, Inc., Devin Helmes, Amanda Salinas, Anahi Garcia, David Cortez, and Juan Zamora ("K-Six"), respectfully submit that the petition for certiorari should be denied. Respondents file this Brief in Opposition to comply with the obligation imposed by Supreme Court Rule 15.2.

STATEMENT OF THE CASE

This case arises out of a defamation claim that Petitioner filed against K-Six. The factual background is set forth in the opinion of the Texas Court of Appeals for the Fourth Judicial District. *See* Pet. App. C.; *K-Six Television, Inc. v. Santiago*, 75 S.W.3d 91 (Tex. App.-San Antonio 2002, no pet.).

1 Petitioner sued K-Six in Texas state court alleging that two news broadcasts had defamed him. K-Six moved for summary judgment pursuant to the Texas Rules of Civil Procedure. The trial court denied the motion for summary judgment. In accordance with Texas statutory law, K-Six filed an interlocutory appeal. Section 51.014(a)(6) of the Texas Civil Practice & Remedies Code permits such an appeal by a member of the electronic or print media, where the media relies upon a defense arising under the First Amendment to the U.S. Constitution, Article 1, Section 8 of the Texas Constitution, or general libel law as codified by Texas statutes. In his response to K-Six's appeal, Petitioner never asserted that section 51.014(a)(6) was violative of the United States Constitution. After full briefing on the merits and oral argument,

the Texas appellate court reversed the trial court and rendered judgment that Petitioner take nothing against K-Six. The appellate court subsequently denied Petitioner's motion for rehearing, which did not raise any issue challenging the constitutionality of the Texas interlocutory appeal provision.

Petitioner did not appeal the decision of the court of appeals. Instead, he filed a petition for writ of mandamus in the Texas Supreme Court seeking dismissal of K-Six's appeal on jurisdictional grounds. Pet. App. A. Petitioner based his mandamus action entirely on the argument that K-Six had not properly invoked the interlocutory appeal statute. The sole issue that Petitioner asked the Texas Supreme Court to resolve was whether the court of appeals "erroneously exercised appellate jurisdiction over an interlocutory appeal." *Id.* at vii. Petitioner's argument and authorities focused solely on the construction and application of the Texas statute. Petitioner never asserted that the Texas statute was unconstitutional. The Supreme Court of Texas denied the petition for writ of mandamus without opinion. Pet. App. B. The Petition before this Court complains solely of this action by the Texas Supreme Court. Pet. at 2.

REASONS FOR DENYING THE PETITION

Petitioner is challenging the constitutionality of a Texas statute without first allowing Texas courts to determine the issue. Petitioner ignores this Court's repeated admonishment that it will not review federal claims that have not been properly presented to the state court whose judgment is under review. By failing to raise

the constitutional argument below, Petitioner has deprived the State of Texas of the opportunity to review the constitutionality of its own legislative enactment. By raising the constitutional argument for the first time in this Court, Petitioner has presented to this Court materials that were not provided to the Texas court of appeals or to the Texas Supreme Court. The materials included in Petitioner's Appendix at Tabs H through L were not presented to *any* court in this process and cannot be considered a part of the record of this case.

Even if Petitioner's federal claims were properly before this Court, they are without merit. This Court has noted on several occasions that the First Amendment does not mandate special procedural protections for media defendants in defamation claims. However, it has never held that the First Amendment *precludes* states from enacting procedural rules that may inure to the benefit of media defendants. Likewise, Petitioner's Equal Protection claim misses the mark completely. Application of the rational basis test shows an enactment that is rationally related to a legitimate state purpose. At least one Texas court has rejected a similar challenge to the statute under state constitutional grounds, finding there is a reasonable basis to the classification in the statute. Accordingly, review should be denied.

1. This Court has often stated that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" under review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (internal citations omitted). Petitioner's federal constitutional claims were neither addressed by, nor properly presented to, the Texas Supreme Court. His petition for writ of mandamus focused solely on

the interpretation and application of Texas Civil Practice & Remedies Code section 51.014 (a)(6), and whether K-Six had properly invoked appellate jurisdiction. In fact, he admits in his Petition to this Court that the mandamus proceeding "was based solely upon the improper exercise of jurisdiction by the appellate court." Pet. at 8. His prayer asked the Texas Supreme Court to instruct the court of appeals to dismiss the appeal for lack of jurisdiction, and remand the case for trial. Pet. App. A, at 15. Nowhere in his petition to the Texas Supreme Court did Petitioner identify, much less brief, the federal claims asserted in the Petition before this Court. As noted above, the Texas Supreme Court denied the request for mandamus relief without opinion.

"When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Adams*, 520 U.S. at 86; *see also Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987) ("When the highest state court has failed to pass on a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.") (internal quotations omitted). Thus, the silence of the Texas Supreme Court creates a presumption that the Petitioner can overcome only by demonstrating that the state court had fair opportunity to address the federal question at issue. In *Adams*, this Court noted some of the ways a petitioner could overcome this presumption: by showing that the federal claim was presented to the state court at the time and in the manner required by state law; that state procedural requirements could not serve as an independent and adequate state law ground for the state

court decision; or otherwise that he presented the claims in issue to the state court with "fair precision and in due time." *See Adams*, 520 U.S. at 87.

Petitioner cannot overcome this presumption. His passing references to federal authorities in his mandamus petition did not present a federal question for determination by the Texas Supreme Court. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987) (holding that the "casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to [Supreme Court] appellate jurisdiction under 28 U.S.C. §1257(2)"). Under either jurisdictional or prudential considerations, review should be denied.

2. Even if Petitioner were able to overcome the jurisdictional deficiencies in his petition, the federal claims he seeks to assert are completely without basis in law. Petitioner seems to be asserting that the United States Constitution prohibits states from affording procedural protections to defamation defendants. As legal authority for this broad conclusion, Petitioner cites *Calder v. Jones*, 465 U.S. 783 (1984). Petitioner misconstrues *Calder*. The issue in *Calder* was whether California courts could exercise personal jurisdiction over a Florida resident accused of publishing defamatory matter in California. The media defendant argued that its First Amendment protections should be taken into account in the jurisdictional analysis. This Court rejected this argument, noting that the infusion of First Amendment considerations "would needlessly complicate an already imprecise inquiry" into personal jurisdiction. *Id.* at 790. This Court further noted that the potential chilling effect on protected

First Amendment activity arising from defamation claims was adequately taken into account by restrictions on the substantive law governing such suits. *Id.*

As applied to the statute at issue in this case, the most that can be said of the rule announced in *Calder* is that the First Amendment might not require states to permit interlocutory appeals to media defendants in defamation cases. This is far different from the Constitution *prohibiting* a statute that permits such appeals. Petitioner cites no authority that would even suggest that the First Amendment precludes the states from enacting procedural rules such as Texas Civil Practice & Remedies Code section 51.014(a)(6).

Petitioner's claim that the Texas statute violates the Equal Protection Clause of the Fourteenth Amendment must also fail. Petitioner concedes that rational basis review is the appropriate test for his Equal Protection challenge. Pet. at 23. Under rational basis scrutiny, the enactment need only be rationally related to a conceivable and legitimate state end. *See, e.g., Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). The burden is upon the challenging party to negate "any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Petitioner has not met this burden. The basis for the Texas interlocutory appeal statute has been articulated by Texas courts: "One rationale for the statute is to save the time and expense of a trial on the merits when the media may be entitled to a constitutional or statutory defense." *KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779, 784 (Tex. App.-Houston [1st Dist.] 1999, writ denied) (reviewing

statute under "reasonable basis" analysis and rejecting state constitutional challenge to classification). Petitioner appears to accept this rationale, arguing only that the rationale somehow violates the U.S. Constitution. He again mistakenly relies on the *Calder* case as authority for the proposition that the U.S. Constitution bars "special solicitude" for members of the media. Pet. at 23. Petitioner's arguments before this Court are without support in the law.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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